141-384

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 320.

EDWIN S. FOWLER AND SOPHIE FOWLER, APPELLANTS,

vs.

THE EQUITABLE TRUST COMPANY.

No. 321.

THE EQUITABLE TRUST COMPANY, APPELLANT,

vs.

EDWIN S. FOWLER ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 4, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 320.

EDWIN S. FOWLER AND SOPHIE FOWLER, APPELLANTS,

vs.

THE EQUITABLE TRUST COMPANY.

No. 321.

THE EQUITABLE TRUST COMPANY, APPELLANT,

vs.

EDWIN S. FOWLER ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	3	2
Real-estate mortgage bond No. 2416	5	2
2417	7	4
2418	9	5
2419	11	6
2420	13	8
2421	15	9
2422	17	10
2423	19	12
2425	21	13
Deed of trust from Edwin S. Fowler *et ux.* to Jonathan Edwards, November 1, 1873	29	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1891.

3 *Bill of Complaint.*

To the judges of the circuit court of the United States for the southern district of Illinois:

The Equitable Trust Company, a corporation organized and doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business in the city of New London, in the said State of Connecticut, and with a branch office at No. 16 Exchange Place, in the city of New York, in the State of New York, a citizen of the State of Connecticut, brings this its bill against Edwin S. Fowler and Sophie Fowler, citizens of the southern district of Illinois, and Henry Davis, a citizen of the State of Michigan; Henry R. Bond, of New London, a citizen of the State of Connecticut, and Robert P. Johnston, of St. Louis, a citizen of the State of Missouri.

And thereupon your orator complains and says that on the first day of November, A. D. 1873, one Edwin S. Fowler, being indebted to your orator in the sum of nine thousand dollars for borrowed money, made and delivered to your orator his nine certain coupon mortgage bonds, each for the principal sum of one thousand dollars, of that date, and thereby bound himself to pay unto your orator, at the city of New York, on the first day of November, A. D. 1878, said principal sum of nine thousand dollars, with interest thereon from the date thereof at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year, for and until the 1st day of November, A. D. 1878, and after said November 1st, 1878, to pay unto your orator interest

4 on said principal sum of nine thousand dollars, expressed in said nine bonds until paid, at the rate of ten per centum per annum, at your orator's office, in the city of New York, and which said writings obligatory are in the words and figures following, to wit:

5 UNITED STATES OF AMERICA.

1000. Number 2416. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May, A. D. 1879, together with interest thereon, from and after the date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company,

in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder thereof, at once become due and payable, anything hereinbefore contained to the contrary, notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
6 insured to the amount of $4,000 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

EQUITABLE TRUST COMPANY;
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee of New York duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars.

7 UNITED STATES OF AMERICA.

1000. Number 2417. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder thereof, at once become due and payable, anything hereinbefore contained to the contrary, notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
8 insured to the amount of $4,000, and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November A. D. 1873.

EDWIN S. FOWLER. [L. s.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee of New York duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars.

9 UNITED STATES OF AMERICA.

1000. Number 2418. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder thereof, at once become due and payable, anything

hereinbefore contained to the contrary, notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $4,000, and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee of New York duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand (18,000) dollars.

11 UNITED STATES OF AMERICA.

1000. Number 2419. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally

become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder thereof, at once become due and payable, anything hereinbefore contained to the contrary, notwithstanding: such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
12 insured to the amount of $4,000 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee of New York duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars.

13 UNITED STATES OF AMERICA.

1000. Number 2420. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding: such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
14 insured to the amount of $4,000 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof, become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November, A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars.

15 UNITED STATES OF AMERICA.

1000. Number 2421. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer, on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding:

such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
16 insured to the amount of $4,000 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois this first day of November, A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for an actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars.

17 UNITED STATES OF AMERICA.

1000. Number 2422. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
18 insured to the amount of $4,000 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary, notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield, Illinois, this first day of November, A. D. 1873.

EDWIN S. FOWLER [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars.

19 UNITED STATES OF AMERICA.

1000. Number 2423. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfield of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which I we promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of *May* A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises
20 insured to the amount of $4,000, and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary, notwithstanding.

In witness whereof, I have hereto affixed my hand and seal at Springfield, Illinois, this first day of November, A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars.

21 UNITED STATES OF AMERICA.

1000. Number 2425. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, that I Edwin S. Fowler of Springfied of the county Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879, together with interest thereon, from and after date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company, in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore con-

tained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $4,000, and the insurance policies
22 properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary, notwithstanding.

In witness whereof, I have hereto affixed my hand and seal at Springfield, Illinois this first day of November, A. D. 1873.

EDWIN S. FOWLER. [L. S.]

Seal of Equitable Trust Company.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above-bond, according to the terms thereof.

EQUITABLE TRUST COMPANY,
By ADRIAN FRESING, *Vice-Pres.*

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars given for actual loan of money made by the Equitable Trust Company to Edwin S. Fowler and secured by a mortgage from Edwin S. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars.

23 Your orator further shows that, to secure the payment of the principal sum expressed in said nine bonds and the interest that should thereafter accrue thereon, the said Edwin S. Fowler and Sophie Fowler, his wife, on the same day, to wit, November 1st, 1873, by their trust deed of that date; conveyed to one Jonathan Edwards, of the city of New York, in fee simple, the following-described real estate, with the appurtenances thereto belonging, to wit: Part of lot one (1), block fourteen (14), old town plat of the town—now city—of Springfield, Illinois, bounded as follows: Beginning at the southeast corner of said lot one, thence running north two degrees east eighteen and one-half feet (18½); thence north eighty-eight degrees west one hundred and five (105) feet; thence south two degrees west one and one-quarter (1¼) feet; thence north eighty-eight degrees west, seventeen and one-half (17½) feet; thence south two degrees west seventeen and one-quarter (17¼) feet; thence south eighty-eight degrees east one hundred twenty-two and one-half (122½) feet to the place of beginning, situate in Sangamon county, in the State of Illinois.

In trust, nevertheless, for the purpose of securing the principal sum and interest so due to your orator as aforesaid and subject to conditions of defeasance upon the payment of the said principal sum and interest according to the effect of the said nine bonds, and which

said deed of trust was, on the twenty-third day of February, A. D. 1874, duly acknowledged, and afterward, on the same day,
24 February 23rd, 1874, filed for record in the recorder's office of the county of Sangamon aforesaid, as by the said deed of trust and its accompanying certificates of acknowledgements and recording, ready to be produced in court and now here shown and exhibited and made part of this bill.

Your orator shows, in said deed of trust it was, among other things, provided that in the case of the death of the trustee therein named, said Jonathan Edwards, Henry R. Bond, of New London, Connecticut, should become the successor in trust, invested with the title to the premises and having like powers and authority in the premises; and in case of the refusal to act of the said successor trustee, Henry R. Bond, one Robert P. Johnston, then of Springfield, Illinois, should thereupon become the successor in trust of the said Jonathan Edwards, and Henry R. Bond be invested with the title to the said premises and with like powers and authority in the premises.

Your orator shows further that in and by said deed of trust it was, among other things, provided that in case of default in the payment of the said principal sum of money or the interest accruing thereon, the said trustee, or his successor in trust, was authorized and empowered, after notice by publication in the manner directed, to make sale of the premises aforesaid, and, in such event, from the proceeds of such sale to pay all the costs, charges, and expenses of such advertisements, sale, and conveyance, including such a commission as by the laws of the State of Illinois sheriffs are allowed on the sale of real estate on execution in Sangamon county.

Your orator further shows that in and by said deed of trust it was also provided that the trustee, from the proceeds of the
25 sale of said premises, after default, should pay to the legal holder of said principal bonds any and all sums of money paid out and expended by such legal holder to redeem said premises from any sale for taxes or assessments thereon or to save the said premises from sale on account thereof, together with ten per cent. interest thereon per annum from the time of such payment up to the time of such sale.

Your orator further shows and charges that the said Edwin S. Fowler did not, nor did any person for him, pay to your orator, at the city of New York or elsewhere, the whole or any part of the principal sum of nine thousand dollars expressed in said nine principal writings obligatory on the first day of November, A. D. 1878, when, by the terms of said writings obligatory, the same became due and payable, nor yet upon any subsequent day, and that the same remains now wholly unpaid; nor did the said Edwin S. Fowler or any person for him pay to your orator, at the city of New York or elsewhere, the interest accruing on said principal writings obligatory from and after the said first day of November, A. D. 1878, when and as the same accrued and became payable according to the tenor and effect of the said writings obligatory, and the same remains now wholly unpaid.

Your orator further shows and charges that Jonathan Edwards, the trustee named and appointed in said deed of trust, departed this life on or about the 30th day of May, A. D. 1882, and
26 that the successor trustees, Henry R. Bond and Robert P. Johnston respectively, have and do refuse to act as such and to exercise the powers and authority in them invested in and by the said deed of trust, whereby resort to a court of equity is rendered necessary to divest the said trustees of the legal title in them vested by said deed of trust; that, resort to equity thus being rendered necessary, your orator is equitably entitled to recover, as a part of his expenses of foreclosure and in lieu of the usual solicitor's fee, the commission upon the sum found due to your orator allowed by the laws of the State of Illinois to sheriff of Sangamon county on sales of real estate on execution.

Your orator further shows and charges that before proceedings under this bill of foreclosure can pass to decree and sale the taxes, both State, county, town, and city, for the year 1882 and now already levied will, by virtue of the revenue laws of the State of Illinois, become a lien upon the said above-described premises and the same become due and payable, and that to save the said premises from sale on account thereof your orator will be compelled to pay the same; for which payment when so made and for all sums of money so expended, with the interest thereon from the date of payment, at the rate of ten per cent. per annum, your orator is equitably entitled to reimbursement out of the proceeds of the sale of said premises and for which your orator's equitable lien upon said premises is complete.

Your orator further shows and charges that Sophie Fowler, of Springfield, Illinois, and Henry Davis, said to be a resident
27 of the city of Detroit, in the State of Michigan, as your orator is informed, claims some title or interest in the premises hereinbefore described as mortgagee or otherwise, the extent and nature of which is to your orator unknown, but which orator charges is junior and subordinate to the rights and equities of your orator in the premises.

Wherefore, as orator charges, the said premises so conveyed has become forfeited, subject, nevertheless, to redemption in equity.

Your orator therefore asks the aid of this court in the premises, and makes the said Edwin S. Fowler, Sophie Fowler, Henry Davis, Henry R. Bond, and Robert P. Johnston parties defendant to this bill, to the end that they may be required to answer the same according to the rules and practice of this court, but not under oath, their answers under oath being hereby waived; that an account may be taken, under the direction of the court, of the amount found to be due to your orator on the 1st day of November, A. D. 1878, on said nine writings obligatory, and interest thereon from said 1st day of November, A. D. 1878, at the rate of ten per centum per annum, as also the amount of a reasonable solicitor's fee, not exceeding the commission allowed by the laws of the State of Illinois to the sheriff of Sangamon county on sales of real estate on execution, on the amount found to be due to your orator from the said mortgagor under said

deed of trust; that the said defendants, one or more of them, may be decreed to pay to your orator the full sum that shall appear on such accounting to be due to it, together with the costs of this proceeding and the reasonable solicitor's fee, by a short day to be fixed
28 by the court; that in default of such payment the said mortgaged premises may be sold, as directed by the court, to satisfy the amount due and costs; that, in case of such sale and a failure to redeem therefrom pursuant to the statute of the State of Illinois in such case provided, the defendants and all persons claiming through and under them subsequent to the commencement of this suit may be forever barred and foreclosed of all right and equity of redemption in the said premises, and that your orator may have such other and further relief in the premises as equity may require and to your honors may seem meet.

And may it please your honors to grant unto your orator the usual writ of subpœna in chancery, issuing according to the rules and practice of this court, requiring the said defendants and each of them, on a day certain to be therein named, personally to appear in this cause and make answer as aforesaid, and to stand to and abide such other order and decree herein as may be entered in this cause.

EQUITABLE TRUST COMPANY,
By W. L. GROSS, *Its Solicitor.*

W. L. GROSS,
Comp's Sol'r, Springfield, Ill.

(Indorsed:) Filed October 26, 1882. J. A. Jones, clerk.

29 *Deed of Trust.*

This indenture, made this first day of November, in the year of our Lord one thousand eight hundred and seventy-three, between Edwin S. Fowler and Sophie Fowler, his wife, of the county of Sangamon and State of Illinois, of the first part, and Jonathan Edwards, of the city, county, and State of New York, of the second part, witnesseth:

That whereas the said Edwin S. Fowler is justly indebted unto the Equitable Trust Company of New London, Connecticut, in the principal sum of nine thousand dollars, lawful money of the United States of America, being for a loan thereof, on the day of the date hereof, made by said Equitable Trust Company to said Edwin S. Fowler, secured to be paid by nine certain coupon mortgage bonds of the said Edwin S. Fowler, bearing even date herewith, payable to the said Equitable Trust Company of New London, Connecticut, or bearer, or, if registered, to the registered holder thereof, in and by which said Edwin S. Fowler promises to pay to the said Equitable Trust Company of New London, Connecticut, the principal sum of nine thousand dollars five years after date hereof, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first day of May and November in each year, until said principal sum is fully paid, and both principal and interest payable at the office of the Equitable Trust Company, in the

city of New York; which said several installments of interest for said period of five years are further evidenced by ninety in-
30 terest coupons of even date herewith, payable to the Equitable Trust Company or bearer, or the registered holder thereof, as appears by such coupons, each of them for the sum of thirty-five (35) dollars, and payable as follows, viz., nine of them on the first day of May in each year and nine of them on the first day of November in each year until said principal sum is fully paid, at the office of the Equitable Trust Company, in the city of New York, in and by which said bonds it is agreed that if default be made in the payment of any one of the installments of interest aforesaid at the time and place when and where the same becomes due and payable as aforesaid, and such default shall continue for three days after such installment becomes due and payable as aforesaid, then, at the election of the legal holder of said bonds, the said principal sum of nine thousand dollars shall at once become due and payable, anything thereinbefore contained to the contrary notwithstanding, such election to be made at any time after the expiration of said three days without notice; and which said bonds for nine thousand ($9,000.00) dollars were given to secure a loan of that amount, payable five years after date thereof, with interest at ten (10) per cent. per annum, payable semi-annually, of which said interest seven (7) per cent. per annum is secured by this deed of trust and is to be paid as in said bond provided, and the balance, to wit, three per cent. annum, has been discounted, and the same, less the discount thereon, paid at the time of the execution of these presents;

31 Now, therefore, the said party of the first part, for the better securing the payment of the said sum of money mentioned in said coupon mortgage notes, with the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part and his successors in trust and assigns forever all the certain lot, piece, or parcel of land situate, lying, and being in the city of Springfield, county of Sangamon, in the State of Illinois, known and described as follows, to wit:

Part of lot one (1), block fourteen (14), old town plat of the town (now city) of Springfield, Illinois, bounded as follows, to wit: Beginning at the southeast corner of said lot one, thence running north 2° east eighteen and one-half (18½) feet; thence north 88° west one hundred and five (105) feet; thence south 2° west one and one-quarter (1¼) feet; thence north 88° west seventeen and one-half (17½) feet; thence south 2° west seventeen and one-quarter (17¼) feet; thence south 88° east one hundred and twenty-two and one-half (122½) feet to the place of beginning—

32 Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and re-

mainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances:

To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his successors in trust and assigns forever.

In trust, nevertheless, that if default shall be made in the payment of the said principal sum of money above mentioned (whether the same shall have become due by election as aforesaid or by the regular maturity of said bonds five years after date thereof) or of said interest coupons as they may mature, or if the said Edwin S. Fowler shall at any time hereafter until said principal sum and all the arrearages of interest thereon shall be fully paid suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, in, upon, or about said premises or any part thereof anything that may in anywise tend to diminish the value thereof or to impair, weaken, or diminish the security intended to be affected under and by virtue of this instrument, or shall neglect or fail to keep all the buildings except outhouses that now are or hereafter may be situate on said premises insured and cause such insurance to be made payable in case of loss to said party of
33 the second part or his successors in trust, and the policies of insurance and all renewal certificates thereof to be delivered to him or them, as hereinafter covenanted and provided, or shall fail in anywise promptly and faithfully to fulfill, keep, and perform all and singular the covenants and agreements contained in these presents by him or them to be kept and performed, then and from thenceforth it shall be lawful for the said party of the second part or his successors in trust, on application of the legal holder of said bonds, with or without a previous entry upon said premises, to sell and dispose of said premises hereby granted or intended so to be, and all right, title, benefit, and equity of redemption of said party of the first part, his heirs and assigns, therein at public auction, to the highest bidder, for cash, having first given thirty days' notice of the time and place of such sale (such sale to be made at the front door of the court-house of the county of Sangamon and State of Illinois, by advertisement in any one of the daily newspapers that may at that time be published in the English language in said Sangamon county), personal notice of such sale to said party of the first part, his heirs, executors, administrators, or assigns, or any persons claiming by, through, or under him being hereby expressly waived and excused, and in the name of the said party of the second part or his successors in trust to make, execute, and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance in the law for the premises sold in fee simple; and all the recitals that may be contained in such deed or deeds setting forth the fact of such default as aforesaid, due notice,
34 advertisement, and sale and any and all such other facts and statements as may be proper to evidence the legality of such

sale and conveyance, and that the same has been duly made in all respects so as to meet all the requirements herein contained or arising in law, and as may be necessary to convey a good title, shall be deemed to be true, and shall be considered and taken on all occasions and as between all persons as *prima facie* evidence of the truth of all the facts and matters set forth in such recitals, and such deed or deeds shall be effectual to pass the title and all the right and equity of redemption of said party of the first part, his heirs, executors, and assigns, in and to the premises sold; and out of the money arising from such sale the said party of the second part or his successors in trust shall pay—

First. All the costs, charges, and expenses of such advertisement, sale, and conveyance, including commissions such as are at the time of such sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution in said Sangamon county.

Second. All premium money paid for any insurance, as hereinafter provided, and all money and sums of money which said party of the second part or his successors in trust or the legal holder of said bonds may at any time before such sale pay or expend to redeem said above-described premises from any sale or sales for taxes or assessments or to save the same from sale on account thereof or to protect the title or possession of said premises or any part thereof, with interest on all money so advanced or expended, at the rate of ten per centum per annum, from the time of so paying or expending the same up to the time of such sale.

35 Third. All of said principal money first hereinbefore mentioned and the accrued interest thereon that shall at the time of such sale remain unpaid; and

Fourth. Render the overplus of the purchase-money, if any there be, unto the said Edwin S. Fowler, his heirs or assigns, on reasonable request.

And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase-money; which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming or to claim the said premises or any part thereof by, from, or under them or any of them.

And the said party of the first part, for the purpose of enabling said party of the second part and his successors in trust to make an advantageous and judicious sale of said premises, do hereby authorize and empower him or them to adjourn said sale from time to time at his or their discretion, of which adjourned sale it shall be sufficient to give ten days' notice by advertisement in such newspaper as aforesaid, the first publication whereof to be on the day following the day on which, but for such adjournment, said sale should have taken place; and the party of the second part or his successors in trust need not go to the said place of sale to announce such adjournment; and at such sale said party of the second part or his successors in trust may sell said premises entire, without division, or in parcels, as he or they may elect. And the said party of the first part, for the con-

36 sideration above mentioned, does hereby expressly waive and

release all right and benefit which they have or to which they may be entitled in and to said premises and the proceeds of sale thereof under and by virtue of an act of the General Assembly of the State of Illinois entitled "An act to exempt home- from sale on execution," approved February 11, 1851, and the several amendments of the same, as well as under any and all other acts of said General Assembly of a like character or for a similar purpose, and agree to surrender possession of said premises to the purchaser or purchasers at such sale peaceably, on demand.

And the said Edwin S. Fowler, for himself, his heirs, executors, or assigns, do- covenant, bargain, and agree to and with the said party of the second part, his successors in trust and assigns, that he, the said Edwin S. Fowler, is well seized of the premises above described as of a good, sure, perfect, absolue, and indefeasable estate of inheritance in the law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free from all other and former grants, mortgages, liens, encumbrances and from taxes, assessments, and sales therefor of any name, kind, nature, or description whatsoever, and the same in the peaceable and quiet possession of the party of the second part, his successors in trust, his and their assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof he and his heirs will warrant and forever defend; and the said Edwin S.
37 Fowler, for himself, his heirs and assigns, does covenant, grant, and agree to and with the said party of the second part and his successors in trust that he will well and truly pay the principal sum of money and interest thereon mentioned in said bonds according to the tenor and effect thereof, and will not at any time hereafter until the said principal sum and the interest thereon shall be fully paid suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, nor do nor permit to be done to, in, upon, or about said premises anything that may in anywise tend to impair the value thereof or to weaken, diminish, or impair the security intended to be effected under and by virtue of this instrument.

And, further, that said E. S. Fowler, his heirs and assigns, shall and will at all times hereafter until said principal sum of money and all arrearages of interest thereon shall be fully paid *to* keep all the buildings, outhouses excepted, now situate or that may hereafter be erected upon said premises fully insured against loss or damage by fire in some good and responsible insurance company or companies (the selection of such insurance company or companies to be left to the option of the said party of the second part or his successors in trust) in the fair insurable value of such buildings, and cause such insurance to be made payable, in case of loss, to the said party of the second part or his successors in trust and deliver to him or them each, all, and every the policies of insurance therefor as soon as and whenever such insurance shall be effected and all renewal certificates of such policies, and in default of so doing the said

party of the second part or his successors in trust, at his or
38 their option, may effect such insurance in his or their own name or names or otherwise, and the premium money paid therefor shall be a charge upon said premises and shall be, and is hereby, declared to be secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said Edwin S. Fowler to the said party of the second part or his successors in trust on demand and may be collected at any time after the same shall have been paid, with interest thereon, at the rate of ten per centum per annum, from the time the same shall be advanced, and the said party of the second part or his successors in trust shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest and shall have the right to collect and receive any and all money and sums of money that may at any time become collectable or receivable upon each, all, and every of such policies of insurance and apply the same, when received, in the same manner, as far as possible, as is hereinbefore provided for the application of the proceeds of said above-described premises under the power of sale hereinbefore contained; but nothing herein contained shall be construed as requiring the said party of the second part or his successors in trust to incur any expense or make any effort to collect any money that may become due on any of such policies of insurance, but if he or they shall elect not to collect the same he or they shall make such election within a reasonable time after such money shall become collectable, and on
39 demand of said Edwin S. Fowler, his executors, heirs, or assigns, shall thereupon forthwith, after making such election not to collect, execute any necessary order or assignment to cause said insurance money to be paid to said Edwin S. Fowler, his heirs or assigns.

A reconveyance of said premises shall be made by the party of the second part or his successors in trust to said Edwin S. Fowler, his heirs or assigns, at said Fowler's expense, on full payment of the indebtedness aforesaid and performance of the covena-ts and agreements made herein by the party of the first part.

And in case of the death, absence from the United States, inability or refusal to act of the said party of the second part at any time when his action under the foregoing powers and trusts may be required, then Henry R. Bond, of New London, Connecticut, shall be, and he is hereby, appointed and made successor in trust to said party of the second part under this deed, with like powers and authority, and the title to said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

And in case of death, absence from the United States, inability or refusal to act of said party of the second part and of the said Henry R. Bond at any time when action under the foregoing powers and trusts may be required, then Robert P. Johnston, of Springfield, Illi-
nois, shall be, and he hereby is, appointed and made successor
40 in trust to said party of the second part and the said R. P. Johnston under this deed, with like powers and authority,

and title to said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

In testimony whereof the said party of the first part have set their hands and seals, at Springfield, Illinois, this day and year first above written.

EDWIN S. FOWLER. [SEAL.]
SOPHIE FOWLER. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Sangamon, City of Springfield, }

I, Lucien B. Adams, a notary public in and for the said city and State aforesaid, and residing in said county, do hereby certify that Edwin S. Fowler and Sophie Fowler, his wife, personally known to me to be the real persons whose names are subscribed to the foregoing instrument as having executed the same, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all their right, title, and interest in and to the premises described in said instrument and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all laws of the State of Illinois to exempt homesteads from sale on execution.

41 And the said Sophia Fowler, wife of the said Edwin S. Fowler, having been by me examined separate and apart from and out of the hearing of her said husband, and the contents and meaning of the said instrument and her rights under the laws of the State of Illinois having been by me made known and fully explained to her, she acknowledged that she had freely and voluntarily executed the said instrument and relinquished her dower and all her right, title, and interest to the lands and tenements therein mentioned and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all such laws of the State of Illinois without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this 23rd day of February, A. D. 1874.

[NOTARIAL SEAL.]

L. B. ADAMS,
Notary Public.

STATE OF ILLINOIS, } ss:
Sangamon County, }

RECORDER'S OFFICE, SANGAMON COUNTY, ILL.,
CITY OF SPRINGFIELD, *Feb.* 23, 1884.

I, James A. Winston, clerk of the circuit court within and for the county aforesaid and *ex officio* recorder of deeds, mortgages, and other instruments of writing required by law to be recorded, do hereby certify that the within instrument is duly recorded in my office, in Book No. 37 of Mortg's, page 270.

JAMES A. WINSTON,
Clerk and ex Officio Recorder, Sangamon County, Ill.

(Indorsed:) Filed October 26, 1882. J. A. Jones, clerk.

42 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

The United States of America to Edwin S. Fowler, Sophie Fowler, Henry Davis, Henry R. Bond, and Robert P. Johnston, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Equitable Trust Company this day filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this 26th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[SEAL.]

J. A. JONES, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against them as confessed and a decree entered accordingly.

J. A. JONES, *Clerk.*

42½ [Endorsed:] No. 6457. Circuit court United States, southern district of Illinois. Equitable Trust Company *vs.* Edwin S. Fowler *et al.* Chancery subpœna. Returnable to rule day first Monday in December, A. D. 1882. J. A. Jones, clerk. Filed Nov'r 2nd, A. D. 1882. J. A. Jones, clerk. Wm. L. Gross, compl't's sol.

Executed this writ upon the following-named defendant, not having been able to find her to serve personally, by leaving a true copy thereof, with the seal of the court thereto attached, for her, at her usual place of abode, with a person above the age of ten years and a member of her family and to whom the contents were made known by me, to wit, upon Sophie Fowler, on the 1st day of November, A. D. 1882, with Lulu Fowler.

Edwin S. Fowler, Henry Davis, Henry R. Bond, and Robert P. Johnston not found in my district.

JACOB WHEELER, *U. S. M.*,
By G. A. FOSTER, *Deputy.*

I have served the within writ upon the persons therein named in the following manner, to wit:

Upon —— —— on the — day of ——, A. D. 188-; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–,

by personally delivering each of them a copy of the same on the aforesaid days.

I also served the same on the following-named defendants, not having been able to find —— to serve personally, by leaving a true copy thereof for —— each of —— ——, at —— usual places of abode, with person above the age of ten years and member of —— respective famil— and to whom the contents were made known by me, to wit:

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also
Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also
Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also
Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also
Upon —— —— on the — day of ——, A. D. 188–, with —— ——.

Marshal's fees:

——— service ---- ---- $———
——— copies ---------- $———
——— miles---------- $———
——— ---------- $———
$———

—— ——, *U. S. Marshal,*
By —— ——, *Deputy.*

43 UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

The United States of America to Edwin S. Fowler, impleaded with Sophie Fowler, Henry Davis, Henry R. Bond, and Robert P. Johnston, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Equitable Trust Company this day filed in the clerk's

office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the [SEAL.] Supreme Court of the United States of America, at Springfield aforesaid, this ninth day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh.

J. A. JONES, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against him as confessed and a decree entered accordingly.

J. A. JONES, *Clerk.*

43½ [Endorsed:] No. 6451. Circuit court United States, southern district of Illinois. Equitable Trust Company *vs.* Edwin S. Fowler *et al.* Chancery subpœna. Returnable to rule day first Monday in December, A. D. 1882. J. A. Jones, clerk. Filed November 9, A. D. 1882. J. A. Jones, clerk. Wm. L. Gross, compl't's sol.

Executed this writ Nov. 9, 1882, at Springfield, Ill., upon Edwin S. Fowler by leaving a true copy thereof at his residence with Lulu Fowler, a member of his family above the age of ten years, to whom the contents of this writ *was* made known.

JACOB WHEELER,
U. S. Marshal,
By G. A. FOSTER, *Deputy.*

I have served the within writ upon the persons therein named in the following manner, to wit:

Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–,

by personally delivering each of them a copy of the same on the aforesaid days.

I served the same on the following-named defendants, not having been able to find him to serve personally, by leaving a true copy

thereof for him, *each of* at his usual places of abode, with person above the age of ten years and member of his *respective* family and to whom the contents were made known by me, to wit:

Upon Edwin S. Fowler on the 9th day of Nov., A. D. 1882, with Lulu Fowler; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——.

Marshal's fees:

——— service ---------- $———
——— copies ---------- $———
——— miles ---------- $———
——— ---------- $———
$———

JACOB WHEELER,
U. S. Marshal,
By —— ——, *Deputy.*

44 And afterwards, to wit, on the fourth day of December, in the year last aforesaid, being at the June term of said court, the following proceedings were had in said court and entered of record, to wit:

Entry of Appearance.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.*
} In Chancery.

This day come the defendants, Edwin S. Fowler and Sophie Fowler, by N. M. Broadwell, Esq., their solicitor, and enter their appearance herein.

Then, afterwards, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-three, the following further proceedings were had in said court and entered of record, to wit:

Leave to Answer.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.*
} In Chancery.

On motion of defendants, by N. M. Broadwell, Esq., their solicitor, leave is granted them to answer herein by the 20th day of January inst.

45 *Answer of Edwin S. Fowler.*

In the United States Circuit Court within and for the Southern District of Illinois. January Term, A. D. 1883.

The answer of Edwin S. Fowler, one of defendants, to the bill of complaint of The Equitable Trust Company, complainant.

This defendant, now and at all times saving and reserving to himself all benefit and advantage of exception which can or may be taken or had to the many insufficiencies and uncertainties in said bill contained, for answer thereto says—

That, as the complainant in and by its said bill makes no exhibits of the alleged bonds and trust deed, this defendant cannot say whether he made and executed the same as alleged and set forth in and by said bill or not. Wherefore he denies all allegations in said bill contained wherewith he is charged with having made and executed the bonds and trust deed referred to in and by said bill.

And this defendant, further answering, says that about the first day of November, A. D. 1873, one R. P. Johnston, having an office and doing business in the city of Springfield, Illinois, for said complainant, proposed, on behalf of said complainant, to lend this
46 defendant the sum of nine thousand dollars for the period of five years, at seven per cent. interest per annum, which said proposed loan this defendant accepted, and executed and delivered to said Johnston, as the agent of said complainant, his obligations for said sum and a trust deed to secure the same; but this defendant does not know, as no exhibits are made in and by said bill, whether the trust deed and bonds in said bill referred to are the same or not, but he supposes they are the bonds & trust deed so referred to.

And this defendant, further answering, says that if said nine bonds mentioned in said complainant's bill are the same obligations given by him as aforesaid to said Johnston as agent of complainant they and each of them are usurious, in this: that while they, in the aggregate, are for the sum of nine thousand dollars, as a matter of fact the said Johnston only paid this defendant ($7,972.74) the sum of seven thousand nine hundred and seventy-two $\frac{74}{100}$ dollars as a loan on said obligations, and that the balance of said sum of nine thousand dollars was kept, held, and retained
47 by said Johnston under the pretense and claim that the same, said balance, was to be appropriated and held by him as his compensation for negotiating said loan, when the fact is that this was a device or contrivance to cover and conceal the usurious character of said transaction, and so this defendant here charges that the said complainant, by and through its said agent, Johnston, consummated said loan to this defendant in the manner aforesaid to evade and avoid the statute of the State of Illinois in regard to usury; and defendant avers that said loan was and is tainted with usury, and he here sets up and pleads said statute, and claims and insists upon its protection, benefits, penalties, and forfeitures.

And this defendant, further answering, says that he denies each and every allegation in said bill contained, save and except the allegation that complainant is a supposed corporation, assuming to be organized and doing business under the laws of the State of Connecticut, which said allegation of the foreign character of said complainant and its supposed power and right to do business under the laws of said State of Connecticut this defendant believes
48 to be true, and therefore admits the same.

And this defendant, further answering, says that by the laws of Connecticut the *the* said complainant was forbidden to loan money at a greater rate of interest than six per cent. per annum, and that in conducting the business as aforesaid by and through said agent in the State of Illinois the said complainant sought to evade and set at naught the laws of its creation, and to escape from the restrictions and limitations thereof; and so defendant says that said corporation complainant had no power nor authority under the laws of the State of Connecticut to do and transact the business as aforesaid by and through its said agent.

And said defendant, further answering, says that said complainant by the laws of its creation did not receive a grant of power or authority to carry on the business of loaning money for hire or at interest in any State or country foreign to or other than the State of Connecticut, and that said complainant, being a foreign corporation without such power, had no right under the laws of Illinois to exercise the prerogative and privilege of loaning
49 money in the State of Illinois, and so defendant says that the bonds and trust deed mentioned in complainant's bill are void and of no effect in law or equity.

And this defendant, further answering, says that some years ago certain persons duly organized a corporation under the laws of the State of New York for the declared purpose of carrying on the life-assurance business, which said corporation so organized was duly named and called the Equitable Life Assurance Company, with its chief office in the city of New York, and that in the proper exercise of its powers and privileges said corporation extensively engaged in the business of life assurance and so successfully conducted the same that in course of time a large sum of money was accumulated as the earnings or profits of said business.

And this defendant, further answering, says that said Equitable Life Assurance Company have no power or authority under its charter and the laws of New York to loan money and receive real-estate security therefor, and that certain of the corporators of said Equitable Life Assurance Company went over into the State
50 of Connecticut and organized the said Equitable Trust Company, with an office in the city of New York, for the purpose and with the intent, by and through the agency of said complainant, to loan said earnings or profits for interest, contrary to the laws of New York, and that said contrivance of loaning said earnings or profits by and through said complainant was and is a subterfuge to evade and avoid the laws of New York; and defendant avers that said bonds and trust deed in said bill mentioned

were given and received by complainant to secure a loan of said earnings or profits furnished to complainant by said Equitable Life Assurance Company, and that said loan was for the benefit of said last-named company, which is without power to make such loan or recive such security.

And this defendant, further answering, says that he denies that the complainant is entitled to the relief or any part thereof in said bill claimed and demanded; and defendant prays the same advantage of this his answer as if he had pleaded or demurred to said bill; and defendant prays to be hence dismissed with his reasonable costs & charges, &c.

EDWIN S. FOWLER,
By his sol., N. M. BROADWELL.

(Indorsed:) Filed January 20, 1883. J. A. Jones, clerk.

51 And afterwards, to wit, on said twentieth day of January, of the year last aforesaid, came the defendants, Henry R. Bond and Robert P. Johnston, and entered their appearance herein, and also at same time filed their refusal to act as trustees; which appearance and refusal are as follows:

Appearance of Defendants Bond & Johnston.

UNITED STATES OF AMERICA, }
Southern District of Illinois. }

In the Circuit Court Thereof, of the June Term, A. D. 1882.

EQUITABLE TRUST CO.
vs.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, & ROBERT P. JOHNSTON. } In Chancery.

Henry R. Bond and Robert P. Johnston, defendants in the above-entitled cause, in proper person, come and severally waive the issue and service of process herein and severally enter their appearance herein.

HENRY R. BOND.
ROBERT P. JOHNSTON.

(Indorsed:) Filed January 20, 1883. J. A. Jones, clerk.

52 *Refusal of Henry R. Bond to Act as Trustee.*

NEW LONDON, *October 16th*, 1882.

To Equitable Trust Company:

I, Henry R. Bond, hereby refuse and decline to act as trustee under a certain trust deed, dated November 1st, 1873, made by Edwin S. Fowler and Sophie Fowler to Jonathan Edwards, as trustee, recorded in records of Sangamon county, Illinois, in Book of Mortgages 37, at page 270.

Respectfully, HENRY R. BOND.

Refusal of R. P. Johnston to Act as Trustee.

ST. LOUIS, MO., *Nov.* 10, 1882.

To Equitable Trust Co.:

I, Robert P. Johnston, hereby refuse and decline to act as trustee under the certain trust deed above herein described and referred to.

ROBERT P. JOHNSTON.

(Indorsed:) Filed January 20, 1883. J. A. Jones, clerk.

Then, afterwards, to wit, on the twenty-second day of February, of the year last aforesaid, came again the complainant and filed its replication to answer herein, to wit:

53 *Replication.*

STATE OF ILLINOIS, }
—— *County.* }

In the United States Circuit Court for Southern District of Illinois.

EQUITABLE TRUST COMPANY }
vs. } In Chancery.
EDWIN S. FOWLER *et al.* }

The replication of Equitable Trust Co., complainant, to the separate answers of Edwin S. Fowler and Sophie Fowler and of Henry Davis, defendant-.

This repliant, saving and reserving to itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and
54 things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays — in and by its said bill it has already prayed.

W. L. GROSS,
Solicitor for Complainant.

(Endorsed:) Filed February 22nd, 1883. J. A. Jones, clerk.

Afterwards, to wit, on the twelfth day of March, in the January term of said court and year last aforesaid, the following further

proceedings were had in said court in said cause and entered of record, to wit:

Default as to Bond & Johnston.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

This day comes the complainant, by William L. Gross, Esq., its solicitor, and the said defendants, Henry R. Bond and Robert P. Johnston, having entered their appearance herein and having
55 failed to file their answer in accordance with the rules and practice of this court, it is therefore ordered and adjudged that the default of said defendants, Henry R. Bond and Robert P. Johnston, be, and the same is hereby, accordingly entered of record and the complainant's bill of complaint be taken *pro confesso* against said defendants.

Whereupon, on motion of complainant, this cause is referred to the master in chancery of this court to take testimony and compute the amount due said complainant and make report thereof to this court.

Afterwards, to wit, on the second day of April, of the year last aforesaid, came the master in chancery of said court and filed in the clerk's office of said court his report of amount due in the words and figures following, to wit:

Report of Amount Due.

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.* } In Chancery.

56 The report of John A. Jones, master in chancery of said court, to whom said cause was referred for computation and report.

Said master, to the hon. judges of said court, reports as follows:

That complainant produced before him nine real-estate mortgage bonds, dated November 1st, 1873, and due May 1st, 1879, ea. $1,000.00 ..... 9,000 00

Interest, 10%, after due to April 2, '83 ..... 3 y'rs, 7,200; 11 mo., 825; 1 d'y, 2 50 ..... 3,527 50

Insurance advanced by compl't Feb'y 15, '83, $38.00; int. 1½ mos., 47 cts. 38 47

$12,565 97

Credits admitted by complainant July 1, 1881	$1,391 02	
January 30, 1882	288 00	
		1,679 02
		$10,886 95
Solicitors' fees as prayed for, being same as sheriffs' fees of circuit courts, Illinois		166 29
		$11,053 24

All which is respectfully submitted to the court.
Dated Springfield, Ills., April 2, '83.

J. A. JONES,
M. C., U. S. C. C., S. D. Ill.

(Endorsed:) Filed April 2, 1883. J. A. Jones, clerk.

57 Afterwards, to wit, on the thirtieth day of April of the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Rule on Defendants to Close Testimony.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.* } In Chancery.

On motion of complainant, by W. L. Gross, Esq., its solicitor, the defendants are ruled to close their testimony herein by the first Monday of June next.

Then, afterwards, to wit, on the first day of June, in the term and year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Leave to Amend Answer.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.* } In Chancery.

On motion of defendants, by N. M. Broadwell, their solicitor, leave is granted to amend their answer herein.

58 *Amendment to Answer. Filed June 2, 1883.*

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER *et al.* } In Chancery.

And the said defendant, Edwin S. Fowler, comes, by leave of the court, and amends his answer as follows, to be inserted on 3d page at the end of paragraph closing with words "referred to," to wit:

And this defendant, further answering, says that before and at the date of said bonds the said complainant was carrying on the business of lending money in said city by and through the agency of said Johnston, and that this defendant applied to said agency for a loan of $9,000 for five years at 10 per cent. interest per annum, which application was duly received, and this defendant was informed that said loan on said terms would be made to him; and this defendant avers that when he came to make and execute said bonds and trust deed to secure said loan it was corruptly agreed by and between him and said complainant that the bonds to evidence said loan should be for $9,000 at 7 per cent. interest per annum; that the difference between 7 per cent. and 10 per cent. interest per annum should be ducted from the amount of said loan, $9,000, in
59 advance for the whole period of 5 years, and that this defendant should pay $128.15 to said Johnston as his fee or commissions in the premises; and accordingly, being in great need of money, this defendant closed said business by giving his said bonds for $9,000 at 7 per cent. interest, and received only so much of said sum of $9,000 as was left after deducting therefrom said difference between 10 and 7 per cent. per annum for five years and by paying said sum of $128.15 to said Johnston, and this was and is the whole and only consideration ever received by him as the consideration for said bonds and trust deed; and this defendant avers that said complainant well knew that said Johnston so corruptly concluded and closed said loan.

N. M. BROADWELL,
Sol. for Def't.

And this defendant, for further amendment, by leave of court, for paragraph following above says that said contract for the loan of said money was and is a contract of the State of New York, and that under the laws of that State the said contract is usurious, the same being for a greater rate of interest than seven per cent. per annum, and defendant here pleads and sets up the statutes of New York against usury and claims the benefit thereof.

N. M. BROADWELL,
Sol. for Def.

(Endorsed:) Filed June 2, 1883. J. A. Jones, cl'k.

60 Then, afterwards, to wit, on the fifteenth day of October, in the June term of said court and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Appointing H. W. Taft Special Com'r.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.*
} In Chancery.

It is ordered by the court that Henry W. Taft, of the city of New York, be, and he is hereby, appointed special commissioner in the

above-named cause to take the evidence of such witnesses as may be produced before him, the same to be taken orally, at his office, No. 18 Exchange Place, in said city of New York, by the parties herein, in conformity with the rules of equity, and report the same to this court without unnecessary delay.

That reasonable *time* of the time of taking such evidence shall first be given the respective parties or their solicitors.

61 *Deposition of Rob't P. Johnston.*

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY.
vs.
EDWIN S. FOWLER *et al.* } In Chancery.

Testimony of Robert P. Johnston, taken before John A. Jones, master in chancery of said court, at his office, in the city of Springfield, on September 27th, 1883.

ROBERT P. JOHNSTON, being first duly sworn, deposes and says:

About September 27th, 1873, the defendant Edwin S. Fowler made written application to the complainant for a loan of $10,000.00 for five years at 9 per cent. semi-annual interest, secured on real estate. This application I forwarded to the complainant in New York, and afterwards it was by the complainant accepted for $9,000.00 loan at ten per cent. semi-annual interest. The bonds and trust deed were in this case prepared for execution, and the trust deed and abstract of title furnished by the defendant were forwarded to the complainant at New York for its examination and approval. The bonds and trust deed in this case bear date November 1st, 1873. By the terms of the trust deed this loan was to mature five years after the date thereof; whereas *by* the bonds in this case, although dated November 1st, 1873, were to mature May 1st, 1879.

62 Seven per cent. of the interest was evidenced by interest coupons attached to the nine $1,000 bonds in this case. The remaining three per cent. was discounted at the time the loan was finally negotiated. The bonds and trust deed were finally executed and delivered on the 23d day of February, 1874, but as more than three months had elapsed from the date of the trust deed and bonds no interest coupon attached to the bonds was executed by the defendant for the interest that should accrue on said bonds from November 1st, 1873, to May 1st, 1874. On said 23d February, 1874, the present value of this loan was—

Par value of bonds	9,000 00
Less 3% discount from May 1st, 1874, to May 1st, 1879	1,042 20
Leaving	$7,957 80

But as there were no interest coupons attached to these bonds

representing the interest from the date of the trust deed and bonds, viz., November 1st, 1873, to May 1st, 1874, there was then deducted from the $7,957.80 the interest at ten per cent. from the day this loan was negotiated, viz., February 23d, 1874, to May 1st, 1874, 67 days, the sum of $148.11, leaving $7,809.69, as is specifically shown by the statement prepared by me at the time, and which statement is correct and is hereto attached, marked Exhibit D.

63 For this sum of $7,809.69 on the same day, February 23, 1874, I executed and gave the defendant E. S. Fowler my draft on the complainant, payable to his order, which draft is hereto attached, marked "Exhibit E," on the back of which draft I recognise the signature of the defendant E. S. Fowler, showing its payment.

I here exhibit the written application of the defendant referred to hereinbefore, marked "Exhibit F."

I had an agreement with the defendant that upon the completion of this loan that he was to pay me a commission of one hundred dollars. After the loan was completed and after the draft exhibited had been delivered to the defendant he paid me this one hundred dollars. The draft for $7,809.69 exhibited herein was for the full value of this $9,000.00 loan on the day it was negotiated and closed, as before stated and shown, and no deduction from said full value of this loan on that day was made by me on account of my said commission or on any other account whatever. The agreement under which this commission was paid me by the defendant was unknown to the complainant, and no part of said $100.00 belonged to or was paid to the complainant. The expense of the abstract of title fur-

64 nished by the defendant and the acknowledging and recording of the trust deed was, of course, paid by the defendant, but no deduction on account therefor was made from the present value of this loan on the day named.

Shortly before this loan matured, viz., May 1st, 1879, the complainant insisted the loan must either be paid or renewed by the execution of new bonds and trust deed, and of this the defendant was notified by me. What I did with the defendant at this time was done through John Marion, the father-in-law of the defendant, defendant himself being in New York. I was told by Mr. Marion that this loan would be either paid off or renewed, as required by the complainant. This renewal was to be for five years at eight per cent. semi-annual interest, and was conditioned that the accrued interest on this loan, which was then in arrears, should be fully paid; that this renewal, which was to be made as I have stated, was never perfected, owing to delays from time to time of the defendant. No interest on this loan accruing after maturity was paid to me. In the negotiation of this loan from its inception to its completion I acted as the medium of communication between the complainant

65 and the defendant. I was not authorized, neither did I attempt, to accept or reject the defendant's application for this loan—I did, however, recommend its acceptance by the complainant—nor did I pass on the question of title to the real estate, all these matters having been submitted to and decided by the com-

plainant in New York, nor for what I did in connection with this loan was I paid by the complainant anything, nor was I authorized by the complainant to do anything in connection with this loan more than I did and as I have shown.

Cross-examination:

This was the first loan I made for complainant. Afterwards I made other loans, not only to these parties, but to others. I had an understanding with the complainant company a short time before this loan was made. This loan and all other loans I made were in pursuance of this understanding. The complainant furnished me with the blank "Exhibit F" in this case and blank "Exhibit D" and gave me instructions as to how they should be filled up, which I accordingly followed in filling up such blanks. When I procured an application in this way I forwarded same to the company for their consideration, acceptance, or rejection. In my
66 indorsement on this application recommending the loan, in signing my name as agent, I understood myself as agent of the company in this matter. Complainant acted through me in making this loan. In my arrangement with complainant for making these loans it was the understanding that complainant was to pay me nothing whatever for my services, and that I was to procure whatever pay I had from the borrower.

"EXHIBIT D."

AGENCY OF EQUITABLE TRUST COMPANY,
SPRINGFIELD, ILLS., *Feb.* 23, 1874.

Jonathan Edwards, Esq., pres't, 76 Cedar St., New York.

DEAR SIR: We have this day forwarded to you by Am. Express Co. bonds of Edwin S. Fowler, Nos. 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, & 2425 series, and to-morrow shall draw on you in favor of Edwin S. Fowler as per following account:

Par value of bonds	9,000 00	
Less discount from May 1st, 1874, to May 1, 1879	1,042 20	
		7,957 80
Interest from Febr'y 23, 1874, to May 1, 1874, 67 days, at 10%		148 11
Amount of draft		$7,809 69

67 On this security we have insurance, properly assigned to you, as follows:

Company.	Expiration.	Amount.
Commercial Union of London	Jan'y 12, 1875	2,000
Franklin of Philadelphia	Jan'y 12, 1875	2,000

The approval of Richmond Wolcott of the title of this security was enclosed with application.

Yours respectfully, R. P. JOHNSTON, *Agent.*

"EXHIBIT E."

$7,809.69. SPRINGFIELD, ILLINOIS, *Febr'y 23d*, 1874.

Pay to the order of E. S. Fowler seventy-eight hundred and nine $\frac{69}{100}$ dollars, and charge to account of—

R. P. JOHNSTON.

To Equitable Trust Company, 76 Cedar street, New York city.

(Endorsed:) Edwin S. Fowler. Pay E. H. Perkins, Jr., cash., or order, for collection acc't of the Ridgely National Bank of Springfield, Ill. Wm. Ridgely, cash. Received payment. E. H. Perkins, Jr., cashier.

68 "EXHIBIT F."

It will be necessary to give two references in the following blanks as to the pecuniary responsibility of the obligor.

Name: GEO. H. HARLOW,
Secr'y State,
Address: *Springfield, Ills.*

Name: S. H. TREAT,
Judge U. S. Dist. Court,
Address: *Springfield, Ills.*

Application to the Equitable Trust Company of New London, Conn. New York office, 76 Cedar street.

The undersigned applies for a loan secured by a deed of trust on a part of lot 1, block 14, old town plat, in Springfield, Ills., as follows:

Amount of loan: $10,000, for five years.

Annual rate of interest, payable semi-annually: 9%.

Full name of obligor: Edwin Staunton Fowler.

Occupation and present place of business: Physician, Springfield, Ills.

Full name of wife, if married: Sophie Marion Fowler.

Description of property offered as security by lot and block or by metes and bounds: 18½ by 122½ ft., in S. E. cor. lot 1, bl'k 14, O. T. P.

Location: West side of 5th street between Washington and Adams streets, opposite the old State-house square, in Springfield, Ills.

Dimensions of ground: 18½ feet on Fifth street by 122½.

Building materials: Brick.

Purposes of use: Clothing store.

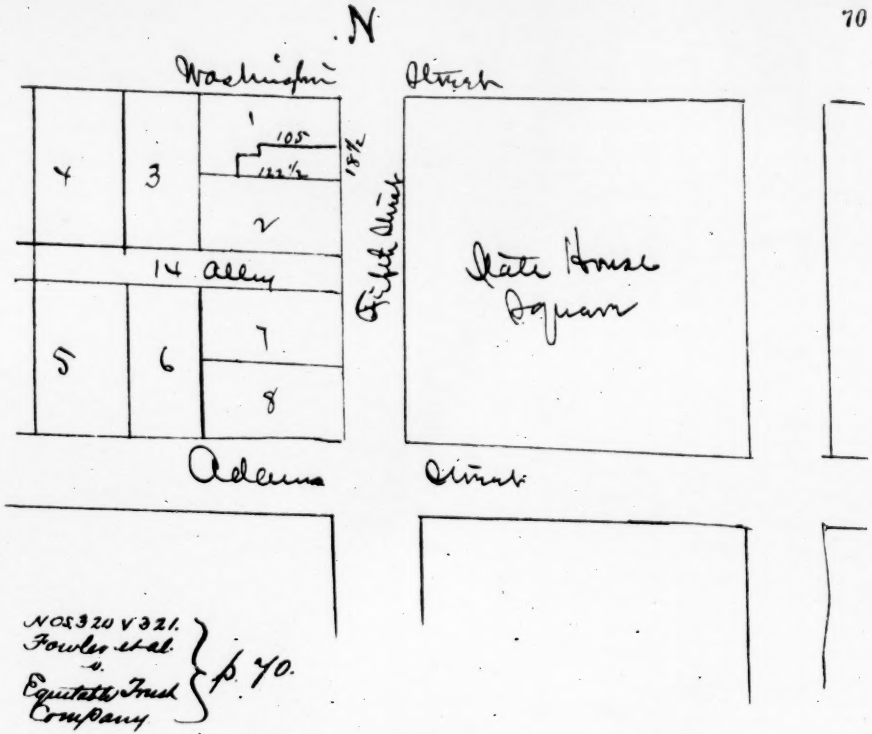
Value of ground, $12,000 } Total, $20,000.
Value of buildings, 8,000 }

Insurance: $4,000.

Loan to be used to: For investment.

Annual rent: $2,000.

69 What mortgages now on premises, and by whom held? None.


N
Washington
Eleventh
1
105
122½
18½
4
3
2
14 Alley
Fifth Street
State House Square
5
6
7
8
Adams
Street
Nos 320 V 321.
Fowler et al.
v.
Equitable Trust Company
$ 70.

Is title a fee simple, unincumbered, except as in last answer? Yes.

Is the street in front paved? Yes. Flagged? Yes. Sewered? Yes. Has it gas pipes? Yes. Water pipes? Yes.

Fire insurance policies and renewals to be effected by and premiums paid through a person named by the company to supervise the same.

N. B.—The applicant will please specify the above particulars as far as practicable and in all cases sign the application.

EDWIN S. FOWLER.

Date, Sep. 27, 1873.

SPRINGFIELD, ILLS.

I have examined the within application, believe the statements to be correct, and recommend a loan to applicant of $10,000 on the security offered.

R. P. JOHNSTON, *Agent.*

(Here follows diagram marked p. 70.)

71 *Deposition of E. S. Fowler.*

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER *et al.* } In Chancery.

Testimony taken before John A. Jones, master in chancery of said court, at his office, in the city of Springfield, on the 22d day of June, 1883.

EDWIN S. FOWLER, being first duly sworn, deposes and says: My name is Edwin S. Fowler, defendant in this suit. I applied to the Equitable Trust Company for a loan. I think the application was in writing and was made through R. P. Johnston, the agent of the company. I am not able to state the contents of the application. I applied to borrow nine thousand dollars for five years at 10 % interest. Mr. Johnston informed me they had accepted the loan. It was closed up by their discounting three per cent. from the principal sum, nine thousand dollars, for five years. I got seven thousand nine hundred and fourty-four dollars and fifty-nine cents ($7,944.59)—that is, after taking out Mr. Johnston's commission. That is as near as I can come to it from the fig-

72 ures I have. In addition to that, they added in the interest from Nov. 1st, 1873, to Feb'y 23rd, 1874, the day I got the money. That is the entire amount of money I received in consideration for executing these bonds and trust deed. Coupons for each year's interest were attached to each bond. I have paid those coupons. There was arrangement between me and the company for a reduction of the interest made about the time of the maturity

of the loan. The agreement was, the interest should be eight per cent. and the loan was to be allowed to run at 8 % interest. Since that time I have paid interest on the loan to the amount of $——. I paid July 1st, 1881, $3,863.95, and on January 30th, 1882, I paid $800.00. These three payments were on all three of the loans, and, so I understood, was all the interest up to Feb'y 1st, 1882. I had a conversation with the officers of the company in regard to the capacity Mr. Johnston was acting for the company. Mr. Elliott told me he was acting as agent for the company in this place. Before this loan was made their agent, Rockwell, came here to get some one to act for them here as their agent, and came to me to suggest some one to loan money for them on real estate.
73 I recommended Mr. Johnston, and took him down to Mr. Johnston and introduced him, and he was appointed. I had a conversation with Mr. Elliott in New York, at the company's office, in regard to the compensation Mr. Johnston was to receive for his services as agent in negotiating this loan. Mr. Elliott was then vice-president, since president. He said Mr. Johnston's fees were paid entirely by the borrower, and that the company paid him nothing. Mr. Johnston told me the same thing.

(Witness refers to Exhibits "A," "B," "C," & "D" in his deposition filed in suit of Equitable Trust Company *vs.* Rose H. Fowler *et al.* and asks that they may be taken as evidence in this case.)

I received a statement from the company showing the amount of interest due on each one of these loans up to July 1st, 1881. Upon that statement I remitted $3,863.95, which statement, marked Exhibit "A," is hereto attached and exhibited:

EXHIBIT "A." J. A. Jones, M. C.

E. S. Fowler.

1879.			
Nov. 1.	To 6 mos.' int. on loan @ 8 %	360 00	
1880.			
May 1.	" " " " " " "	360 00	
Nov. 1.	" " " " " " "	360 00	
1881.			
May 1.	" " " " " " "	360 00	
			1,440 00

74 R. H. Fowler.

1879.			
Nov. 1.	To 6 mos.' int. on loan @ 8 %	240 00	
1880.			
May 1.	" " " " " " "	240 00	
Nov. 1.	" " " " " " "	240 00	
1881.			
May 1.	" " " " " " "	240 00	
			960 00

S. & E. S. Fowler.

1880.			
Feb. 1.	To 6 mos.' int. on loan @ 8 %	450 00	
Aug. 1.	" " " " " " "	450 00	
1881.			
Feb. 1.	" " " " " " "	450 00	
			1,350 00

EXHIBIT "B." J. A. Jones, M. C.

NEW YORK OFFICE, 16 EXCHANGE PLACE,
NEW YORK, *Aug.* 14, 1882.

E. S. Fowler in account with the Equitable Trust Company of New London, Conn.

1879.			
Nov. 1.	To 6 mos.' int. on loan		360 00
1880.			
May 1.	" " " " " "		360 00
Nov. 1.	" " " " " "		360 00
1881.			
May 1.	" " " " " "		360 00
Nov. 1.	" " " " " "		360 00
1882.			
May 1.	" " " " " "		360 00
" 1.	" principal of loan		9,000 00

CR.

1881.			
July 1.	By cash		1,391 02
1882.			
Jan. 30.	" "		288 00

Interest to be added at 8 % to all items from their date to date of settlement.

75 Cross-examination:

X Int. 1. The application you made in this case was for $9,000.00 at ten per cent.?

Ans. I think so. I don't remember the terms of the application.

X Int. 2. When was the application made?

Ans. That I don't remember; I suppose in the first part of 1874.

X Int. 3. Was the trust deed in this case executed by you and your wife about the day of its date?

Ans. About the time of its acknowledgement, is my recollection of it. I can't fix a date now nine years ago.

X Int. 4. When were the bonds in this case executed by you?

Ans. I think about February 23, 1874.

X Int. 5. How long before Feb. 23, 1874, did you make the application you have spoken of?

Ans. I don't know.

X Int. 6. When were you notified your application was accepted?

Ans. I can't remember the date.

76 X Int. 7. If the trust deed and bonds were executed about Feb. 23, 1874, why did you have them dated Nov. 1st, 1873?

Ans. I think it was to suit their convenience—certainly not mine.

X Int. 8. How would it suit their convenience?

Ans. I don't know, unless it was to have the interest fall due on the first days of November and May.

X Int. 9. When did you deliver the trust deed and bonds and get the money you did get?

Ans. About the 23rd of February, 1874.

X Int. 10. When you made application did you furnish an abstract of title?

Ans. I furnished an abstract of title some time before the loan was completed.

X Int. 11. Did any considerable time elapse before the furnishing of the abstract and the closing of the loan?

Ans. I can't tell; I have no data with which to fix the time.

X Int. 12. What is the rate of interest specified in the bond itself?

Ans. Seven per cent.

77 X Int. 13. What rate of interest after maturity?

Ans. Ten per cent.

X Int. 14. Did the interest coupons so provide?

Ans. I think they did.

X Int. 15. Have you the first interest coupon detached from these bonds?

Ans. I suppose I have, but cannot lay my hands on them.

X Int. 16. Seven per cent. being provided in bonds, what was done about the other three per cent.?

Ans. Taken out in advance.

X Int. 17. What was the amount thus taken out from the amount of the loan, $9,000.00?

Ans. One thousand and fifty-five dollars and twenty-five cents ($1,055.25).

X Int. 18. From what time and to what time was this $9,000.00 discounted at 3%?

Ans. I see this loan falls due May 1st, 1879, by the bonds and by the trust deed; five years from Nov. 1st, 1873. My notion is the loan was discounted for five years.

78 X Int. 19. Look at the 9 bonds and trust deed exhibited in this case by the complainant and state if these are the bonds which this trust deed was given to secure.

Ans. I think they are.

X Int. 20. What would be the discount on $9,000.00 five years at 3 per cent.?

Ans. I don't know; would have to get a bank clerk to do that.

X Int. 21. You say you received on this loan $7,944.59, and, in addition, the interest from Nov. 1, '73, to February 23, 1874. How and by whom was this money paid you?

Ans. It was paid by Mr. Johnston; how I don't know—whether by check or draft.

X Int. 22. Don't you know that you were paid by draft on the complainant?

Ans. I don't.

X Int. 23. When did the bonds in this case mature?

Ans. By the terms of the bonds, November 1st, 1878.; by the trust deed, May 1st, 1879.

X Int. 24. Did you make the arrangement with Mr. Elliott, of which you have spoken in your examination-in-chief, by
79 which you say the rate of interest on this loan was reduced after maturity to 8 per ct. before or after May 1st, 1879?

Ans. It was just before or after the maturity of the loan, and I don't remember.

X Int. 25. What time did the loan in the case of Rose H. Fowler mature, and was the arrangement you speak of having made in this case made at the same time as the arrangement you made in her case?

(Objected to.)

Ans. I don't remember when hers matured without looking at the papers, nor do I know if they were made at the same time. There were two loans of mine and one of hers.

X Int. 26. State the time, terms, and conditions of the arrangement you say you made with Mr. Elliott as to the rate of interest on this loan after maturity. And was the same in writing?

Ans. The arrangement, I think, was verbal. The time was about the time of the maturity of the loan. The conditions were in allowing the loan to run. I went to see him with a view of either getting a less rate of interest or paying it off. These exhibits show that they charged eight per ct. I mean exhibits to which I have already alluded in Rose H. Fowler's case.

80 (Last part of answer objected to by complainant.)

X Int. 27. How long was this loan to run under that arrangement?

Ans. I don't think there was any understanding.

X Int. 28. Was no specified time fixed by which the principal was to be paid under this arrangement?

Ans. I think not.

X Int 29. When, under this arrangement, were you to pay the interest after maturity?

Ans. I suppose semi-annually. I paid ten per ct. on it (the interest) when not paid at maturity.

X Int. 30. By Exhibit "B" you appear to have paid July 1st, 1881, $3,863.95. What part of this was for interest on this loan?

Ans. Complainant's statement shows, Exhibit A, $1,572.00, one hundred and thirty-two dollars ($132.00) of which is ten per ct. interest on deferred interest payments—compound interest.

X Int. 31. On that day, July 1st, 1881, was any part of the interest on this loan accruing before maturity unpaid?

Ans. I think not.

X Int. 32. Had you made the arrangement for reducing
81 the rate of interest after maturity before July 1st, 1881?

Ans. Yes, sir; their exhibits show that.

X Int. 33. When was the last payment of interest on this loan prior to July 1st, 1881?

Ans. I think it was September 30, 1879. I paid them by check $2,057.50. I simply paid them the amount due them on everything—I mean on the three loans; cannot state what part of the check was for interest on this loan.

X Int. 34. Up to what time did this check pay the interest on this loan?

Ans. According to Exhibit "A," May 1st, 1879.

X Int. 35. Is it not true that you never did make an arrangement with complainant for reducing the rate of interest on this loan?

Ans. Why, of course, it is not true; their own exhibits show it is not true.

X Int. 36. Was any part of the $7,944.59 withheld by Mr. Johnston from you on account of his commission?

Ans. That is the part I got after Johnston took his commission out.

X Int. 37. What part of the $7,944.59 was for interest on
82 the $9,000.00 from Nov. 1st, 1873, to Feb. 23, 1874?

Ans. None of it. I told you before that was to be added—it was paid in addition.

X Int. 38. Do you mean you have paid interest on this loan from Nov. 1st, 1873, to Feb. 23, 1874?

Ans. No; my answer wouldn't imply a meaning of that kind.

X Int. 39. The bonds, by their appearance, appear to draw interest from November 1st, 1873. If you did not pay interest from that day to February 23, 1874, when and how was that interest adjusted between you?

Ans. It was adjusted then, at the time, by deducting it. They accounted for the interest in the difference of time.

X Int. 40. When did you have the conversation in New York with Mr. Elliott in regard to Mr. Johnston's compensation?

Ans. That was probably in the winter of 1879 or 1880. I can't remember the time exactly. I had it with Mr. Johnston very recently—this winter.

X Int. 41. In your examination in the Rose H. Fowler case you said you arranged with the company for the interest to be re-
83 duced on that loan to 8 per ct. after maturity. In this case you say you made an arrangement in reducing the rate of interest after maturity to 8 per ct. Were these arrangements made at the same or different times?

(Objected to.)

Ans. I think they were made at different times, but I cannot tell the dates.

X Int. 42. Is it not true that you were paid by complainant the

full amount of this loan and accrued interest, with a deduction only of the discount of three per cent. for five years?

Ans. It is true, if you will take Johnston's commission out; besides, I think, I have his receipt for it.

X Int. 43. In the arrangement you speak of having made in this case, was anything else embraced in the contract shown by the bonds and trust deeds except that the rate of interest was to be reduced from ten to eight per cent.?

Ans. Nothing except that the loan was to run at a reduced interest.

X Int. 44. Referring to statement, Exhibit A, in this case, you have said that on this statement on July 1st, 1881, you remitted $3,863.95. Why did you remit more than the statement called for?

84 Ans. That statement shows $3,750.00; that came before this time and I probably added interest on interest up to July 1st.

X Int. 45. Do you want to be understood as saying that the $3,863.95 paid July 1st, 1881; paid the interest on all three of these loans up to July 1st, 1881, at the rate of 8 per cent. on each of these loans after maturity?

Ans. It paid the Rose H. Fowler loan to May 1st, 1881, and it paid compound interest to July 1st, 1881; it paid the Edwin S. Fowler interest up to May 1st, 1881, and the compound interest up to July 1st, 1881, at 8 per ct.; it paid the S. & E. S. Fowler interest up to February 1st, 1881, and compound interest on that loan up to July 1st, 1881. Now, I compounded at 8 per ct., because in all these exhibits they say interest to be added at eight per cent. to all items from their date to date of settlement.

X Int. 46. Give me the dates and amounts of money you have paid as interest on the loan in this case that has accrued since the maturity of the loan.

Ans. These exhibits show $1,391.02 July 1st, 1881, and January 30, 1882; apportionment was $288.00.

85 X Int. 47. Have you made any other or further payments of interest after maturity in this case than the two above specified?

Ans. Yes; September 30, 1879, when I paid $2,057.50; this sum was apportioned upon the three loans as follows: $672.00 on this loan, of which $42.00 was extra interest; $937.50 on the S. & E. S. Fowler loan, of which $37.50 was extra interest; $448.00 on the Rose H. Fowler loan, of which $28.00 was extra interest. These are all the payments of interest made after maturity on these three loans.

X Int. 48. Are you to be understood as saying that the three payments spoken of, viz., $2,057.50, $3,863.95, and $800.00, paid the interest on these three loans up to February 1st, 1882?

Ans. It paid interest on all the six months' installments that were then due, and it paid all the compound interest due up to the time of payment.

X Int. 49. I ask you to refer to Exhibit D in the Rose H. Fowler case and Exhibit B in this case and to state if these statements were

furnished you after the complainant's attorney had notified the defendants in these cases that these trust deeds would be foreclosed if not paid.

86 Ans. I don't remember anything about the time, whether before or after.

X Int. 50. What representations, if any, were made by you to the complainant in behalf of yourself, wife, or Rose H. Fowler prior to the rendering of these statements, Exhibits D & B above, and after these claims were placed in the hands of complainant's attorney for foreclosure in regard to the threatened foreclosure proceedings?

Ans. I asked them to give me further time, which they declined. I offered to pay $2,000.00 on each claim if they would wait four or five months, and they declined to wait. I offered no inducements to furnish these statements; they furnished them voluntarily.

Proof introduced before the master in chancery of said court on November 17, 1883, in behalf of cross-bill of Henry Davis, filed herein:

Mortgage executed by Sophie Fowler & husband to Henry Davis, dated March 30, 1882, to secure note of $2,500.00, marked Ex-
87 hibit A; above note due in one year from March 30, 1882, with interest at 8 per cent. before and after maturity, signed by Sophie Fowler and Edwin S. Fowler, marked "Exhibit B."

(Indorsed:) Filed June 22, 1883. J. A. Jones, clerk.

88 EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

Decree. Entered October 20, 1884.

And now, on this day, this cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that by reason of the non-payment of the balance of the principal sum actually received by the defendant Edwin S. Fowler, secured by said mortgage and bonds and now due, to wit, the sum of twenty-nine hundred eighty & $\frac{67}{100}$ dollars ($2,980.67), and the sum of two hundred seventy & $\frac{94}{100}$ dollars ($270.94), insurance and taxes paid by the complainant and interest thereon, there is now due and unpaid to the said complainant the sum of thirty-two hundred fifty-one & $\frac{61}{100}$ dollars ($3,251.61), and also the costs of this suit:

It is therefore ordered, adjudged, and decreed that the said Edwin S. Fowler, or some one of said defendants, or some one for them, pay to the master in chancery of this court, or cause to be paid, the said sum of thirty-two hundred fifty-one & $\frac{61}{100}$ dollars ($3,251.61), and interest thereon from the day of the rendition of this decree,
89 at the rate of six per centum per annum, and all the costs in this suit, within five days from the rendition of this decree.

It is further ordered, adjudged, and decreed that in default of

such payment being made as aforesaid that the master in chancery of this court proceed and sell forthwith the real estate described in and conveyed by the said trust deed, said real estate lying and being in the city of Springfield, in the county of Sangamon and State of Illinois, and described as follows, to wit: Part of lot one (1), in block fourteen (14), old town plat of the town, now city, of Springfield, Illinois, bounded as follows, to wit: Beginning at the southeast corner of said lot one, thence running north 2° east eighteen and a half (18½) feet; thence north 88° west one hundred and five (105) feet; thence south 2° west one and a quarter (1¼) feet; thence north 88° west seventeen and a half (17½) feet; thence south 2° west seventeen and a quarter (17¼) feet; thence south 88° east one hundred twenty-two and a half (122½) feet to the place of beginning; that said master sell said real estate for cash, to the highest and best bidder, at public vendue, at the front door of the court-room of this court, in the city of Springfield, Illinois, between the hours of 10 o'clock
90 a. m. and sunset of the same day, to wit, at 12 o'clock m.; that he give twenty days' previous notice of the time and place and terms of said sale, describing said real estate with reasonable certainty, by advertisement in some newspaper published in the city of Springfield, Sangamon county, Illinois, and that said complainant have the right to bid and become the purchaser at said sale; that he sell said real estate subject to redemption; that said master execute to the purchaser or purchasers at said sale a certificate or certificates of purchase, in pursuance of the statute laws of the State of Illinois relating to the redemption of real estate from sales under execution, certifying and specifying therein the lands purchased by such purchaser or purchasers and the sum or sums paid therefor, or, if purchased by the complainant in said bill, the amount of its bid and the time when the purchaser will be entitled to a deed for such lands, unless the same shall be redeemed according to law by the defendant, Edwin S. Fowler, his heirs, assigns, or grantees, within twelve months from the day of said sale, and his judgment creditors within three months thereafter paying the purchase-
91 money and interest thereon at the rate of eight per cent. per annum, and that said master in chancery also file in the office of the recorder of Sangamon county, Illinois, a duplicate copy of such certificate or certificates duly signed by him, and the said master, out of the proceeds of such sale, shall retain his fees, disbursements, and commissions on said sale; that he pay the officers of this court their costs in this suit, and that out of the remainder of said proceeds he pay to the complainant the said sum of three thousand two hundred fifty-one & $\frac{61}{100}$ dollars ($3,251.61), together with interest thereon at the rate of six per centum per annum from the date of this decree to the day of sale; or, if such remainder shall be insufficient to pay the whole of said amount and interest as aforesaid, then that he apply said remainder to the extent to which it may reach in satisfaction of said amount and interest, and that in case the said premises shall sell for more than sufficient to pay the principal, interest, and costs in this suit, then, after making pay-

ment as aforesaid, the master shall bring the surplus money into court without delay, to abide the further order thereof.

92 It is further ordered, adjudged, and decreed that the defendants and all persons claiming by, through, and under them since the commencement of this suit be forever barred and foreclosed from all equity of redemption and claim of, in, and to the said mortgaged premises or any part thereof if the same are not redeemed according to laws of the State of Illinois in such case provided by the defendant Edwin S. Fowler, his heirs, representatives, and grantees, within twelve months next after the day of such sale and by his judgment creditors within the three months then and next thereafter, and that at the expiration of the fifteen months next after the day of said sale, if such mortgaged premises or any portion thereof are not redeemed as aforesaid, then, upon the production to and filing with the master in chancery of this court of the certificate or certificates of purchase executed by the master as aforesaid, said master shall make, execute, and deliver to such purchaser or purchasers, their heirs, representatives, or assigns, good and sufficient conveyance or conveyances in fee simple of said premises or such portion thereof as shall have been sold to such purchaser or purchasers respectively; and it is further ordered, ad-

93 judged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the said purchaser or purchasers, his, her, or its representatives or assigns, be let into possession of the portion of said premises so conveyed to him, it, or them, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, on the production of the master's deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their representatives or assigns, and on refusal so to do will be considered in contempt of this court.

And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs and expenses of sale as aforesaid, the said master shall specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the

94 defendant Edwin S. Fowler, who is personally liable for the payment of the debt secured by said trust deed, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last-mentioned report, and that the complainant have execution therefor.

And thereupon the complainant entered its motion for a rehearing before a full bench.

Whereupon on said twentieth day of October, of the year last aforesaid, came the complainant, by its solicitor, and filed in the clerk's office of said court its motion and petition for a rehearing in this cause, which motion and petition are as follows, to wit:

Motion for Rehearing.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1884.

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER *et al.*
} In Chancery.

Now comes the complainant, by its solicitor, and moves the court herein that this cause may be reheard and reargued, and that such rehearing and reargument may be had before the full bench of this court at such time as this court may fix—

95 Because it says the questions of law arising in this case are of the gravest importance and have never before been adjudged by this court; that under the ruling of this court, as now expressed, the rights and interests of this complainant corporation, as also the rights and interests of all other non-resident corporations having loans of money secured by mortgage on lands in this State, are or may be seriously affected, and because, in so grave and important a matter, the court itself may well require the fullest research and wisest suggestion of counsel.

W. L. GROSS,
Sol'r for Compl't.

Petition for Rehearing.

In the United States Circuit Court, Southern District of Illinois.

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER *et al.*
} In Chancery. Foreclosure.

The complainant above named respectfully petitions the court in the above-entitled cause upon the entry of decree that a rehearing thereof be allowed before the full bench, and respectfully shows:

1. That, as the petitioner is advised and believes, the ques-
96 tion involved in the decision of the court upon which decree has been entered is novel and wide-reaching and the decision contrary to the prevailing opinion of the bar, on the faith of which very large amounts of money have been invested by complainant and very many corporations.

2. That this question, although, perhaps, suggested by the pleadings, was abandoned upon the first hearing and was raised upon reargument without previous notice to the complainant's counsel.

3. That the argument of *ultra vires* is based upon the laws of the State of Connecticut, and the law of that State is before the court only by judical notice, guided by what the petitioner is advised and believes to be incomplete and misleading statements of the defendant's counsel, the effect of which in the time allowed and with the facilities at hand, it was not feasible for the complainant's counsel to counteract.

4. It seems that the decision was based on the Revised Statutes of Connecticut of the year 1866. The penalty therein provided seems to have been applied herein; and yet the petitioner is advised and believes that the law of 1866 was entirely repealed in 1872 and has never been re-enacted.

97 The law as to interest, which was passed in 1873, the petitioner is advised and believes, provides as the only penalty for usury the forfeiture of the excess of interest only, and that only in case of suit brought for the purpose within one year. The petitioner therefore believes that if the law of 1873 was at all before the court the Connecticut construction of that law was not brought to the attention of the court, and it is doubted whether the books of the statutes and decisions of Connecticut were within the reach of the court or of the complainant's counsel.

5. The petitioner is advised and believes that later statutes of Connecticut throw light upon the meaning of the statute of 1873, and that these later statutes should also be called to the attention of and considered by the court in determining this question.

6. That, as the petitioner is advised and believes, in the year 1875 a law was enacted in Connecticut, which has been in force ever since August 20th, 1875, expressly providing that when the borrower resided or the mortgage security was located in another State where the legal rate of interest was greater than in Connecticut the

98 lender might accept and recover any agreed rate of interest not exceeding the rate legal in that other State; and yet, as the petitioner is advised and believes, this statute was not cited to or considered by the court, although its bearing in this case is manifest.

7. The petitioner is advised and believes that certain authorities in the United States courts which have important bearing on this case were not brought to the attention of the court.

All of which is respectfully submitted.

EQUITABLE TRUST COMPANY.

W. L. GROSS,
Of Counsel for Petitioners.

(Indorsed:) Filed October 20, 1884. J. A. Jones, clerk.

And afterwards, to wit, on the eighth day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and eighty-five, the following further proceedings were had in said court in said cause and entered of record, to wit:

99 *Order for Hearing before Full Bench.*

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.*
} In Chancery.

On motion of complainant, by William L. Gross, Esq., its solicitor, this cause is set for hearing on the 29th day of June inst. before a full bench.

Then, afterwards, to wit, on the thirtieth day of June, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Granting Rehearing before Full Bench.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.* } In Chancery.

(Entered as of October 31, 1884.)

Ordered that the prayer of the petition heretofore filed in said cause for a rehearing before a full bench be granted, and a rehearing is accordingly ordered, to which order defendants then and there excepted.

Afterwards, to wit, on the eleventh day of January, in the
100 year of our Lord one thousand eight hundred and eighty-seven, came again the master in chancery of said court and filed in the clerk's office of said court his supplemental report as follows:

Supplemental Report of M. C.

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
v.
EDWIN S. FOWLER *et al.* } In Chancery.

Supplemental report of John A. Jones, master in chancery of said court.

Said master reports that on the 11th day of January, 1887, the following further proofs were produced before him:

Sum actually advanced by the complainant to the defendants		7,809 69
W. L. Gross, solicitor for complainant, states on oath that complainant, on February 15, 1883, paid for insurance on mortgaged property described in bill	$38 00	
Int. @ 10%, 3 years 10 mos. 26 days	14 87	
		52 87
That complainant, on May 21, 1883, advanced for taxes	211 37	
Int. @ 10%, 3 years 7 months 20 days	76 86	
		288 23
Total amount		$8,150 79

101 All which is respectfully submitted to the court.

J. A. JONES,
M. C., U. S. C. C., South. Dist. Ills.

(Indorsed:) Filed January 11, 1887. J. A. Jones, clerk.

And afterwards, to wit, on the eleventh day of January, in the January term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, the following further proceedings were had in said court in said cause and entered of record, to wit:

102 *Decree.*

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

And now, on this day, this cause again came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit: That by reason of the non-payment of the sum actually advanced by the complainant and secured by said trust deed and bonds, to wit, the sum of seven thousand eight hundred nine dollars and sixty-nine cents, and the further sum of three hundred forty-one dollars and ten cents insurance and taxes paid by the complainant, and interest thereon, there is now due and unpaid to the said complainant the sum of, to wit, eight thousand one hundred fifty dollars and seventy-nine cents, and also the costs of this suit.

It is therefore ordered, adjudged, and decreed that the said
103 Edwin S. Fowler, or some one of said defendants or some one for them, pay to the master in chancery of this court, or cause to be paid, the said sum of eight thousand one hundred fifty dollars and seventy-nine cents and interest thereon from the date of the rendition of this decree at the rate of six per cent. per annum and all the costs of this suit within sixty days from the rendition of this decree.

It is further ordered, adjudged, and decreed that in default of such payment being made as aforesaid that the master in chancery of this court proceed and sell forthwith the real estate described in and conveyed by the said trust deed, said real estate lying and being in the city of Springfield, in the county of Sangamon and State of Illinois, and described as follows, to wit:

Part of lot one (1), block fourteen (14), old town plat of the town (now city) of Springfield, Illinois, bounded as follows, to wit:

Beginning at the southeast corner of said lot one, thence running north two degrees east eighteen and one-half (18½) feet;
104 thence north eighty-eight degrees west one hundred and five (105) feet; thence south two degrees west one and one-quarter (1¼) feet; thence north eighty-eight degrees west seventeen and one-half (17½) feet; thence south two degrees west seventeen and a quarter (17¼) feet; thence south eighty-eight degrees east one hundred and twenty-two and one-half (122½) feet to the place of beginning.

That said master sell said real estate for cash to the highest and best bidder, at public vendue, at the north door of the government

building, in the city of Springfield, Illinois, between the hours of ten o'clock a. m. and sunset of the same day, to wit, at 12 o'clock m.; that he give 20 days' previous notice of the time and place and terms of said sale, describing said real estate with reasonable certainty, by advertisement in some newspaper published in the city of Springfield, Illinois, and that said complainant have the right to bid and become the purchaser at said sale; that he sell said real estate subject to redemption; that said master execute to the purchaser or purchasers at said sale certificate or certificates of purchase in
105 pursuance of the statutes of the State of Illinois relating to the redemption of real estate from sales under execution, certifying and specifying therein the lands purchased by said purchaser or purchasers and the sum or sums paid therefor, or, if purchased by the complainant in said bill, the amount of its bid and the time when the purchaser will be entitled to a deed for such lands, unless the same shall be redeemed according to law by the defendant Edwin S. Fowler, his heirs, assigns, or grantees, within twelve months from the day of said sale and his judgment creditors within three months thereafter paying the purchase-money and interest thereon at the rate of eight per cent. per annum, and that said master in chancery also file in the office of the recorder of Sangamon county, Illinois, a duplicate of such certificate or certificates, duly signed by him.

And the said master, out of the proceeds of such sale, shall retain his fees, disbursements, and commissions on said sale; that he pay all costs of this suit, and that out of the remainder of said proceeds he pay to the complainant the said sum of eight thousand
106 one hundred fifty dollars and seventy-nine cents, together with interest thereon, at the rate of six per cent. per annum, from the date of this decree to the day of sale, or if such remainder shall be insufficient to pay the whole of said amount and the interest as aforesaid, then that he apply said remainder to the extent to which it may reach in satisfaction of such amount and interest, and that in case that the said premises shall sell for more than sufficient to pay the principal, interest, and costs in this suit, then, after making payment as aforesaid, the master shall bring the surplus money into court without delay, to abide the further order thereof.

It is further ordered, adjudged, and decreed that the defendants and all persons claiming by, through, and under them or either of them since the commencement of this suit be forever barred and foreclosed from all equity of redemption and claim of, in, and to said mortgaged premises or any part thereof if the same are not redeemed according to the laws of the State of Illinois in such
107 case provided by the defendant Edwin S. Fowler, his heirs, representatives, and grantees, within twelve months next after the day of such sale and by his judgment creditors within the three months then next thereafter, and that at the expiration of the fifteen months next after the day of sale, if such mortgaged premises or any portion thereof are not redeemed as aforesaid, then, upon the production and filing with the master in chancery of this court of the certificate or certificates of purchase executed by the master as aforesaid, — execute and deliver

to such purchaser or purchasers, their heirs, representatives, or assigns, good and sufficient conveyance or conveyances in fee simple of said premises or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

It is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the said purchaser or purchasers, his, her, or its heirs, representatives, or assigns, be let into possession of the portion of
108 said premises so conveyed to him, her, it, or them, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, on the production of the master's deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their heirs, representatives, or assigns, and on refusal so to do will be considered in contempt of this court.

And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs of this suit and expenses of sale as aforesaid, the said master shall specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the
109 defendant Edwin S. Fowler, who is personally liable for the payment of the debt secured by said trust deed, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last-mentioned report, and that the complainant have execution therefor.

And the said defendants, Edwin S. Fowler and Sophie Fowler, in open court pray an appeal from said decree to the Supreme Court of the United States, said appeal to be a supersedeas, which is granted upon their giving bond, within sixty days from the entry of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

And the said complainant, The Equitable Trust Company, in open court prays an appeal from said decree to the Supreme Court of the United States, which is granted upon its giving bond, within sixty days from the rendition of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

110 Afterwards, to wit, on the fifteenth day of March, in the year last aforesaid, came the complainant and also the defendants Edwin S. Fowler and Sophie Fowler and filed in the clerk's office of said court their respective appeal bonds herein in the words and figures following, to wit:

Appeal Bond of Edwin S. & Sophie Fowler.

Supreme Court of the United States.

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

Know all men by these presents that we, Edwin S. Fowler, Sophie Fowler, George N. Black, P. W. Harts, and Dennis Reardon, are held and firmly bound unto said complainant, Equitable Trust Company, in the sum of five hundred dollars, to be paid to the said Equitable Trust Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1887.

111 Whereas the above-named Edwin S. Fowler and Sophie Fowler have prayed an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the conditions of this obligation is such that if the above-named Edwin S. Fowler and Sophie Fowler shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. S. FOWLER. [SEAL.]
SOPHIE FOWLER. [SEAL.]
GEO. N. BLACK. [SEAL.]
P. W. HARTS. [SEAL.]
DENNIS RIORDAN. [SEAL.]

Sealed and delivered in my presence.
BLUFORD WILSON.

Approved March 15th, 1887.

S. H. TREAT,
District Judge.

(Endors) Filed March 15th, 1887. J. A. Jones, clerk.

112 *Appeal Bond of Equitable Trust Co.*

Supreme Court of the United States.

EQUITABLE TRUST COMPANY
against
EDWIN S. FOWLER and Others. } In Chancery.

Know all men by these presents that we, The Equitable Trust

to such purchaser or purchasers, their heirs, representatives, or assigns, good and sufficient conveyance or conveyances in fee simple of said premises or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

It is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the said purchaser or purchasers, his, her, or its heirs, representatives, or assigns, be let into possession of the portion of
108 said premises so conveyed to him, her, it, or them, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, on the production of the master's deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their heirs, representatives, or assigns, and on refusal so to do will be considered in contempt of this court.

And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs of this suit and expenses of sale as aforesaid, the said master shall specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the
109 defendant Edwin S. Fowler, who is personally liable for the payment of the debt secured by said trust deed, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last-mentioned report, and that the complainant have execution therefor.

And the said defendants, Edwin S. Fowler and Sophie Fowler, in open court pray an appeal from said decree to the Supreme Court of the United States, said appeal to be a supersedeas, which is granted upon their giving bond, within sixty days from the entry of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

And the said complainant, The Equitable Trust Company, in open court prays an appeal from said decree to the Supreme Court of the United States, which is granted upon its giving bond, within sixty days from the rendition of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

110 Afterwards, to wit, on the fifteenth day of March, in the year last aforesaid, came the complainant and also the defendants Edwin S. Fowler and Sophie Fowler and filed in the clerk's office of said court their respective appeal bonds herein in the words and figures following, to wit:

Appeal Bond of Edwin S. & Sophie Fowler.

Supreme Court of the United States.

EQUITABLE TRUST COMPANY
vs.
EDWIN S. FOWLER, SOPHIE FOWLER, HENRY DAVIS, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

Know all men by these presents that we, Edwin S. Fowler, Sophie Fowler, George N. Black, P. W. Harts, and Dennis Reardon, are held and firmly bound unto said complainant, Equitable Trust Company, in the sum of five hundred dollars, to be paid to the said Equitable Trust Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1887.

111 Whereas the above-named Edwin S. Fowler and Sophie Fowler have prayed an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the conditions of this obligation is such that if the above-named Edwin S. Fowler and Sophie Fowler shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. S. FOWLER. [SEAL.]
SOPHIE FOWLER. [SEAL.]
GEO. N. BLACK. [SEAL.]
P. W. HARTS. [SEAL.]
DENNIS RIORDAN. [SEAL.]

Sealed and delivered in my presence.
BLUFORD WILSON.

Approved March 15th, 1887.

S. H. TREAT,
District Judge.

(Endorsed:) Filed March 15th, 1887. J. A. Jones, clerk.

112 *Appeal Bond of Equitable Trust Co.*

Supreme Court of the United States.

EQUITABLE TRUST COMPANY
against
EDWIN S. FOWLER and Others. } In Chancery.

KNOW all men by these presents that we, The Equitable Trust

Company of New London, Connecticut, and B. H. Ferguson, of Springfield, Illinois, are held and firmly bound unto Edwin S. Fowler and others, the defendants in the above-entitled cause, in the sum of five hundred dollars, to be paid to the said Edwin S. Fowler and others, their executors or administrators; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this first day of March, 1887.

Whereas the above-named Equitable Trust Company has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the
113 circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Equitable Trust Company shall prosecute its said appeal and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EQUITABLE TRUST CO.,
[SEAL.] By J. A. ROOSEVELT, *Pres't.*
Attest: W. EMLEN ROOSEVELT, *Sec'y.* [SEAL.]
B. H. FERGUSON.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

CITY AND COUNTY OF NEW YORK:

On this first day of March, 1887, before me, a notary public in and for the county aforesaid, duly commissioned, personally appeared James A. Roosevelt and W. Emlen Roosevelt, to me
114 personally known and known to me to be respectively the president and secretary of the Equitable Trust Company above mentioned and who, as such president and secretary, executed the foregoing instrument, and they acknowledged the execution of said instrument by the said company, and that they had executed the same, affixing the corporate seal thereto as such president and secretary, duly authorized thereto on behalf of the said company.

Witness my hand and notarial seal the day and year last above written.

PATRICK HOGAN,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county clerk's office.

Approved:
S. H. TREAT,
District Judge.

(Endorsed:) Filed March 15, 1887. J. A. Jones, clerk.

115 UNITED STATES OF AMERICA, } *ss:*
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the papers filed and proceedings thereon had in a certain cause wherein The Equitable Trust Company is complainant and Edwin S. Fowler, Sophie Fowler, Henry Davis, Henry R. Bond, and Robert P. Johnston are defendants as the same appear of file and record in my said office.

In testimony whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

JAMES T. JONES, *Clerk.*

Endorsed on cover: S. Illinois C. C. U. S. No. 320. Edwin S. Fowler and Sophie Fowler, appellants, *vs.* The Equitable Trust Company. No. 321. The Equitable Trust Company, appellant, *vs.* Edwin S. Fowler *et al.* Filed February 4, 1888.

Office Supreme Court U. S.
FILED.
APR 13 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

EDWIN S. FOWLER and SOPHIE FOWLER, *Appellants,*
vs. No. 320.
THE EQUITABLE TRUST COMPANY, *Appellee.*

THE EQUITABLE TRUST COMPANY
vs. No. 321.
EDWIN S. FOWLER et al.

ROSE H. FOWLER
vs. No. 322.
THE EQUITABLE TRUST COMPANY.

THE EQUITABLE TRUST COMPANY
vs. No. 323.
ROSE H. FOWLER.

SOPHIE FOWLER and EDWIN S. FOWLER
vs. No. 324.
THE EQUITABLE TRUST COMPANY.

Appeals from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF FOR EDWIN S. FOWLER, SOPHIE FOWLER AND ROSE H. FOWLER.

WILLIAM RITCHIE,
ATTORNEY FOR EDWIN S. FOWLER, SOPHIE FOWLER AND ROSE H. FOWLER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

EDWIN S. FOWLER and SOPHIE FOWLER, *Appellants.*
vs. No. 320.
THE EQUITABLE TRUST COMPANY, *Appellee.*

THE EQUITABLE TRUST COMPANY
vs. No. 321.
EDWIN S. FOWLER et al.

ROSE H. FOWLER
vs. No. 322.
THE EQUITABLE TRUST COMPANY.

THE EQUITABLE TRUST COMPANY
vs. No. 323.
ROSE H. FOWLER.

SOPHIE FOWLER and EDWIN S. FOWLER
vs. No. 324.
THE EQUITABLE TRUST COMPANY.

Appeals from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT.

These are three suits brought by the Equitable Trust Company of New London, Connecticut, to foreclose three separate trust deeds upon as many different parcels of land. The deeds were executed respectively by E. S. Fowler and wife, by Rose H. Fowler and by Sophie

Fowler and husband, all of Springfield, Illinois, where the land in question is situated, and where the suits were brought. The deeds run to Jonathan Edwards, of New York City, as trustee, to secure three several loans of money, made to the defendants by the Equitable Trust Company, which is a Connecticut corporation, having its home office at New London, Connecticut, but its principal place of business at New York City. The first two loans mentioned bore interest at ten per cent., and the last named at nine per cent. In each case, instead of one promissory note, the borrower executed a number of bonds, each for $1,000, and bearing seven per cent. interest only, and secured by the several trust deeds in suit. The remaining interest (being three per cent. in the E. S. Fowler and the R. H. Fowler loans, and two per cent. in the Sophie Fowler loan) was deducted in advance by the lender from the face value of the loan, the borrower receiving only the balance. The first two loans were made in 1874 (prior to July 1st), and the last one in 1876. Each loan ran for five years. The answers of defendants in each suit set up substantially the same matters, viz: that the Equitable Trust Company, under its charter, could not lawfully make contracts calling for a higher rate of interest than seven per cent., that being the lawful rate in Connecticut, and that the securities here were consequently void; that the contract was to be governed by the laws of New York and were therefore void, because bearing a higher rate of interest than seven per cent. per annum; and, finally, that, even if governed by the laws of Illinois, where the land lies, said contracts were usurious, and that all payments made by defendants on account of interest ought to be credited upon the principal.

In each case the borrower paid a commission to the agent through whom the loan was negotiated.

On October 20, 1884, being at the June term of the court below, a final decree was rendered, wherein the court recognized and gave effect to the last named matter of defense, and estimated the several amounts due upon the theory that the loans were usurious under the Illinois statute, and that no interest was recoverable, and that all payments theretofore made on the debt (except the sum paid to the loan agent as commissions) were to be deducted from the principal sum in arriving at the amount that was due; and the land was ordered to be sold to pay such sum. On the same day the complainant company filed a motion and petition for rehearing in each case. So far as the record shows or as counsel in this court are advised, this motion or petition was filed *ex parte* and without notice to defendants' counsel below, and without leave of court. No action was taken on said petition or motion in any of the cases until June 8, 1885, when, on motion of the complainant, the court set the cause for hearing before a full bench, consisting of both Circuit and District judges. On June 30, 1885, an order was entered granting a rehearing. This order was entered *nunc pro tunc* as of October 31, 1884. On January 11, 1887, a second decree was entered in each case. In the E. S. Fowler and the R. H. Fowler suits (where the loans were at ten per cent.) this second decree declared the amount due to be the sum actually received from complainant by the defendants (regardless of the nominal or face value thereof), together with such additional sums for taxes, etc., as had been advanced to date by the lender. But such second decree allowed no deductions from the principal sum on account of any interest that had heretofore been paid.

In the case of Sophie Fowler (being a nine per cent. loan) this second decree allowed the full face value of the loan, with all interest at nine per cent. until maturity, and thereafter at ten per cent. to the date of the decree, all substantially as prayed in the bill.

In the E. S. Fowler and the R. H. Fowler suits both parties have taken appeals from this decree of 1887. In the Sophie Fowler case the defendant alone appeals.

ASSIGNMENT OF ERRORS.

It is submitted that the court below erred in all three causes in the following particulars, viz:

In that the contracts of loan were not decreed to be void.

In that any sum whatever was decreed to be due or owing under said contracts.

In that the several sums paid by defendants on account of interest were not credited upon the principal sum and a deduction or credit to that extent made in fixing the amount due.

In that no deduction or allowance was made (in either the first or the second decrees) for the sums paid by defendants as commissions to the complainant's agent who negotiated the loans.

In that the first decrees (October 20, 1884) were attempted to be set aside after the expiration of the term at which they had been entered, without the necessary steps having theretofore been taken to retain the court's jurisdiction over the causes for that purpose.

In the Sophie Fowler case (at *nine* per cent.) it is submitted that there was further error committed in that the decree allows for the period after maturity the full penal amount of interest (ten per cent.) which is named in the contract, as a penalty for default.

Detailed Statement of Facts.

Some time prior to September, 1873, one Rockwell, representing the Equitable Trust Company, requested Doctor E. S. Fowler to recommend some resident of Springfield who might there act for the company in making loans. One R. P. Johnston was thereupon introduced by Dr. Fowler to Mr. Rockwell and was afterwards appointed by the company and acted at Springfield as the "medium of communication" between the company, or its officers in New York, and persons at Springfield or the vicinity applying for loans. For this purpose Johnston received from the company blank forms appropriate to be used in making out applications for loans, and they instructed him as to the proper use of such forms. They also furnished him with blank letterheads entitled "*Agency of Equitable Trust Company, "Springfield, Ill.*" (Rec., 37, 39, 64, 65.)

Before making any loans for the company Johnston had an understanding with its officers that the company was to pay him nothing for his services in reference to any loans he might negotiate, but that whatever compensation he might receive was to be paid by the borrowers. Each written application for a loan was endorsed by Johnston (when he forwarded it to the company at New York) with a statement to the effect that he, Johnston, had "examined the application," that he "believed the "statements therein and recommended the loan" for some stated sum. Such endorsements were signed "R. P. "Johnston, *Agent.*" Johnston testifies that in so signing these papers he "understood himself as agent of the company in the matter." Johnston had no power to

pass upon any application, either as to the amount, or the character of the security, or the title, or the form of the papers. All these matters he had to refer to the officers at New York, and they were there passed upon and approved, or otherwise. In each case the money was paid to the borrower by a draft on the New York office of the company made out by Johnston upon receiving notice from New York that the final papers (trust deeds, etc.) were in proper shape. In each of the trust deeds Johnston was named as a "successor in trust" with power to foreclose in case of default. Upon the maturity of these loans Johnston, at the company's instance, notified the respective defendants of that fact, and advised them that some arrangements must be made either for payment or renewal, and negotiations to that end were conducted on the company's behalf by Johnston. As to the particular sums paid by the defendants to Johnston by way of commission, it does not appear that the company's officers at New York were definitely informed in regard thereto. The amount in each case was fixed by agreement between Johnston and the borrower, and no part of it was paid over by Johnston to the company, but the whole was retained by himself.

Each application provided that all insurance was "to be effected by and premiums paid through a person named by the company," and such person was to "supervise the same."

The particulars of each loan are as follows:

The E. S. Fowler Loan.

This was nominally a loan of $9,000 for 5 years, with interest at 10% payable semi-annually.

In September, 1873, E. S. Fowler signed a written application (see the form in Record in Nos. 320, & 321, at p. 38). The application was addressed "*To the Equitable Trust Company of New London, Conn., New York office, 76 Cedar street.*" The applicant therein asked for a loan of $10,000 for 5 years at 9%, and stated that the "loan to be used for investment," and proposed that the same be secured by a deed of trust on property in Springfield worth $20,000. This application, with Johnston's recommendation, was forwarded to New York, and was accepted for $9,000 at ten per cent. This last amount was secured by nine bonds for $1,000 each, drawing seven per cent. Each bond was of the following form, viz:

UNITED STATES OF AMERICA.

$1,000 No..... $1,000

Real Estate Mortgage Bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Conn.

Know all men by these presents: That I, Edwin S. Fowler, of Springfield, of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London, Conn., in the sum of one thousand dollars, lawful money of the United States, which sum I promise to pay to the Equitable Trust Company or to the registered holder hereof, or, if not registered, to bearer, on the first day of May, A. D. 1879, together with interest thereon from and after the date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company in the city of New York, on the first days of May and November in each year, on presentation and surrender of the annexed interest coupons, as they shall severally become due as provided herein, and at the rate of ten per

cent. thereon after default of payment of the principal hereof. This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed that if default be made in the payment of any of the installments of interest aforesaid, at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable, as aforesaid, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice. It is further expressly agreed that if at any time, until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of four thousand dollars ($4,000), and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, become due and payable, anything hereinbefore contained to the contrary notwithstanding.

In witness whereof, I have hereunto affixed my hand and seal at Springfield, Illinois, this first day of November, A. D. 1873.

EDWIN S. FOWLER. [L. S.]

This bond is one of nine bonds, amounting in the aggregate to nine thousand dollars, given for the actual loan of money made by the Equitable Trust Company to Edwin S. Fowler.

For value received, the Equitable Trust Company

hereby guarantees the payment of the principal and interest of the above bond, according to the terms thereof.

(CORPORATE SEAL OF EQUITABLE TRUST CO.)

THE EQUITABLE TRUST COMPANY.
By ADRIAN FRESING [Iselin,]
Vice-President.

To each of these nine bonds were attached ten interest coupons of $35 each, one for each half year's interest (May 1, 1874, to May 1, 1879), all payable at the company's office in New York. These bonds were secured by a trust deed upon the land at Springfield, running from Fowler and wife to Jonathan Edwards, the president of the company, and a resident of New York City (Johnston, the Springfield agent, being also named therein as a successor in trust to Edwards). The trust deeds required the grantor to "keep all the buildings, except outhouses, "that now are or hereafter may be on the premises, in- "sured, and cause such insurance to be made payable, in "case of loss, to said party of the second part." Said trust deed recited, among other things, as follows:

"Said bonds for nine thousand dollars ($9,000) were given to secure a loan of that amount payable five years after date thereof, with interest at ten per cent. per annum, payable semi-annually, of which said interest seven per cent. per annum is secured by this trust deed and is to be paid as in said bonds provided, and the balance, to wit: three per cent. per annum, has been discounted, and the same, less the discount thereon, paid at the time of the execution of these presents."

Johnston's explanation (Nos. 320 and 321; Rec., 35 and 36) of the way in which the interest was divided and a part thereof taken in advance, is as follows: "Seven per cent. of the interest was evidenced by interest coupons attached to the nine $1,000 bonds. The remaining three per cent. was discounted at the time the loan was finally negotiated."

The bonds and trust deed were finally executed February 23, 1874, and on that day Fowler received the money ($7,809.69) by draft on New York. Over three months having elapsed at that time since the date of the bonds, the interest coupons for the half year ending May 1, 1874, were destroyed, and the amount actually payable to Fowler on February 23, 1874, was calculated by Johnston as follows:

Par value of bonds	$ 9,000.00
Less discount May 1, 1874, to May 1, 1879	1,042.20
	$ 7,957.80
Interest from February 23, 1874, to May 1, 1874—67 days—at 10%	148.11
Amount of draft	$ 7,809.69

Johnston states in this regard as follows:

"As there were no interest coupons attached to these bonds representing the interest from the date of the trust deed and bonds, viz.: November 1, 1873, to May 1, 1874, there was then deducted from the $7,957.80 the interest at ten per cent. from the day this loan was negotiated, viz.: February 23, 1874, to May 1, 1874, 67 days, the sum of $148.11, leaving $7,809.69. * * * For this sum of $7,809.69, on the same day, February 23, 1874, I executed and gave the defendant E. S. Fowler my draft on the complainant, payable to his order." (See Rec., 36 and 37.) The draft referred to (see "Exhibit E," p. 38) is addressed "To Equitable Trust Company, 76 Cedar street, New York City."

For commissions Johnston was paid $100 by Fowler at the time the loan was made.

Upon this loan Fowler made payments as follows, viz:

90 coupons @ $35 (being all the interest on the bonds to maturity)	$3,150 00
July 1, 1881, paid cash on account	1,391 02
January 30, 1882, paid cash on account	288 00
Total	$4,829 02

(See Elliott's deposition in the record of case No. 324, at page 47.)

In the first decree below (October 20, 1884), the amount due is arrived at by deducting this total ($4,829.02) from the $7,809.69, leaving $2,980.67. But the complainant had also made certain advances, as follows:

February 15, 1883, insurance	$ 38 00
May 21, 1883, taxes	211 37
Total	$239 37

The said decree allowed ten per cent. interest on these advances, making them $341.10, which, added to the $2,980.67, was decreed to be the amount due—total, $3,251.61.

The decree of January 11, 1887, found the amount due to be $7,809.69, *plus* the $341.10—total, $8,150.79.

The R. H. Fowler Loan.

This was nominally a loan of $6,000 for 5 years with interest at 10%, payable semi-annually.

The circumstances of its negotiation were practically the same as those of the preceding case, being made through Johnston by written application of the same form,

accepted in New York, and secured by seven per cent. bonds of $1,000 each (guaranteed by the Equitable Trust Company), and a trust deed of the same form, the remaining three per cent. being "discounted" in advance. This application states that the money is to be "used to purchase land," and is dated June 6, 1874. The bonds and trust deed bear date May 1, 1874, and require the property to be insured to the amount of $6,000. The draft for the money was delivered to the borrower June 23, 1874, for the sum of $5,381.83. Johnston's explanation of how he arrived at this amount is as follows:

Par value of bonds	$6,000.00
Less discount from May 1, 1874, to May 1, 1879	694.80
	$5,305.20
Interest from May 1, 1874, to June 23, 1874, 1 month, 22 days	76.63
	$5,381.83

Johnston says:

"The present value of this loan, as shown by the fore-"going statement, was $5,381.83, for which sum I exe-"cuted and delivered to the defendant on June 23, 1874, "my sight draft on the complainant. * * * The "draft for $5,381.83 was for the full value of this loan on "the day it was negotiated, and no deduction therefrom "was made by me on account of my said commission or "on any other account whatever." (Record in Rose H. Fowler case, pages 36, 39.)

On receiving this draft from Johnston, the defendant paid him a commission of $150.

Upon this loan the defendant has paid on account, as follows:

60 interest coupons @ $35, (being interest on bonds in full to maturity)	$2,100.00
July 1, 1881, pd. cash on acc't	927.35
January 30, 1882, pd. cash on acc't	192.00
Total	$3,219.35

(See Elliott's deposition at page 47 of Sophie Fowler record.)

The decree of October 20, 1884, deducted this total, $3,219.35, from the $5,381.83, leaving $2,162.48, which, with some small additions on account of advances by complainant, constituted the sum then found due, viz.: $2,185.60.

The decree of January 11, 1885, fixed the debt at $5,391.83, *plus* the advances mentioned—total, $5,411.23.

The Sophie Fowler Loan.

This was nominally a loan of $10,000 for 5 years with interest at 9%, payable semi-annually. It was made under circumstances precisely similar to those above narrated. The interest was again divided. Ten $1,000 bonds of the form already given (requiring the property to be insured for $8,000), dated February 1, 1876, bearing seven per cent. interest and guaranteed by the Equitable Trust Company, were secured by one trust deed, and the remaining two per cent. was put in the shape of ten promissory notes, each for $100, falling due at intervals of six months, bearing 10% after maturity and secured by a separate trust deed. The trust deed securing the bonds contains the following recital:

"Said bonds, with the interest coupons thereto annexed, were executed by the said Sophie Fowler and Edwin S. Fowler to said Equitable Trust Company, and are payable at its office in the said city of New York, and were given to secure a loan of ten thousand dollars, payable as aforesaid with interest at nine per cent. per annum, payable semi-annually, of which said interest seven per cent. per annum is secured by this trust deed and is to be paid as in said bonds and the coupons attached thereto provided; and the two per cent. is secured by the notes of the said Sophie Fowler and Edwin S. Fowler, secured by a trust deed made subject to this trust deed, bearing even date herewith of the property herein described, it being agreed by the parties hereto and their representatives and assigns, that the portion of the interest on said principal sum represented by said notes is, at the option of the said Equitable Trust Company, to be retained by said company or its endorsee or assignee of said notes, separate and detached from the said principal of borrowed money and the portion of interest thereon represented by the said bonds and coupons." (Sophie Fowler case, Rec., 21.)

Said trust deed also provided for the payment by the borrower, in case of default, of a "reasonable solicitor's fee, not exceeding five per cent." (Rec., 23), and also required the grantor to keep the property insured and to pay ten per cent. interest on any sums the lender might advance for the purpose, and that action to recover same might be brought at any time "with reasonable attorney's fees for collection." (Rec., 25.)

In the second trust deed (securing the interest notes) the borrower covenanted to pay the principal sum of $10,000, at the maturity of the bonds and the seven per cent. interest secured by the bonds, as well as the said interest notes and interest on the same after their maturity, and provided for a foreclosure on default in *either* case and for "reasonable" solicitor's fees in such event (or, in case of the exercise of the power of sale by the trus-

tee, then "commissions such as allowed by law to sheriffs," and further provided that the grantor should "keep insured all buildings, * * * and "assign the policies to the party of the second part as "*further* security for the said indebtedness," and, in case the lender had to advance such insurance, "the "amount so paid *shall constitute a part of the debt secured* "*by this instrument*, and upon sale of the land under it, "shall, with the amount of said notes and interest, be paid "*to the holder of said notes*." Said second trust deed also provided that the promissory notes thereby secured might "at the option of the Equitable Trust Company, "be retained by said company or its endorsee or assignee "separate and detached from the said principal sum of "borrowed money and interest thereon at the rate of "seven per cent. per annum, represented by said bonds "and interest coupons." (Sophie Fowler, Rec.,28, 29.)

On February 8, 1876, the defendant received from Johnston a draft for $10,017.25, as being the then value of the loan, the $17.25 being interest at nine per cent. from February 1, 1876, to February 8, 1876. Johnston received from defendant $150 commissions on this loan. Payments were made on account as follows:

9% interest on $10,000 from February 1, 1876, to August 1, 1879	$3,150 00
July 1, 1881, Pd. cash on acc't	1,545 58
January 30, 1882, Pd. cash on acc't	391 83
September 30, 1879, Pd. interest on interest	37 50
	$5,124 91

(See Elliot's deposition, record page 47; also, as to last item but one, the Master's report, pages 41 and 78, and "Exhibit 19" to Elliot's deposition, page 57, as to last item.)

The court below, however, appears to have arrived at its figures thus, viz:

All interest to maturity, 9% on $10,000, 5 yrs. (the bill of complaint not claiming any interest to be due for any period prior to maturity. Record, page 19)	$ 4,500 00
January 30, 1882, Paid (as per master's report, page 41)	391 83
Total	$4,891 83

The decree of October 20, 1884, deducted this $4,891.83 from the $10,017.25, decreeing for the balance ($5,125.42), increased by certain sums advanced by complainant, and an allowance of $287 for solicitor's fees. Total amount of decree $5,740.14.

The decree of January 11, 1887, allowed interest in full at nine per cent. to maturity (thus absorbing all payments up to maturity), and also ten per cent. interest on the principal sum of $10,000 from and after maturity to the date of the decree, together with all advances, with like intererest thereon, and $923.49 (being the full 5%) for solicitor's fees, making a total of $19,393.35.

ARGUMENT.

I.

THESE ARE ALL NEW YORK CONTRACTS, TO BE GOVERNED BY THE NEW YORK STATUTES, AND THE SECURITIES ARE, CONSEQUENTLY, VOID.

In 1873, 1874, and 1876 the statutes of New York provided as follows:

SECTION 1. The rate of interest upon the loan or forbearance of any money, goods or things in action shall continue to be seven dollars upon one hundred dollars for one year, and at that rate for a greater or less sum, or for a longer or shorter time.

SEC. 2. No person or corporation shall, directly or indirectly, take or receive any money, goods or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods or things in action, than is above prescribed.

SEC. 5. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, * * * whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

SEC. 8. Whenever any borrower of any money, goods or things in action shall file a bill in chancery for the discovery of the money, goods or things in action taken or received in violation of either of the foregoing provisions, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court of equity require or compel the payment or deposit of the principal sum or any part thereof as a condition of granting relief to the borrower in any case of a usurious loan forbidden by this chapter,

Rev. Stat. N. Y., Banks & Bros., 6th ed.,
Vol. 2, pp. 1164–6.

This is a suit to enforce a security. If the debt or contract for the performance of which that security was given be void, it is plain the security fails likewise and cannot be enforced. In Illinois, as elsewhere, the debt or contract is the principal while the mortgage is the mere incident. A contract void in the place where it is made and to be performed, is void everywhere. If this is a New York contract and be void under the laws of New York, it cannot be enforced in any court in Illinois, notwithstanding it may be in strict accord with the laws of the latter state.

As to the intent of the parties, with respect to which set of laws should govern the contract, we have here no express or explicit declaration from either. We must resort entirely to circumstantial evidence and inference to ascertain what that intent was. Upon this point we note the remarkable fact that in three different loans made at three different times, to three different persons, and in one case the rate of interest differing from that adopted in the other two—nevertheless in all three cases the same *apparent* rate (seven per cent.) is adopted in the instruments which are to go upon the market for negotiation and to be evidence to the world of the nature of the transaction, and that rate thus adopted is not the Illinois, but the New York rate; and further, this is the utmost limit of the New York rate. No one of these bonds contains on its face any reference to any other rate (save that 10% is to be charged as a penalty for default, a device which does not violate the usury laws of any state.) The home of the Equitable Trust Company is Connecticut, and yet New York is selected in each case as the place of payment. The agent in Illinois had no power whatever to accept or reject an application for a loan. Such accept-

ance could only be made by the officers at the New York office. In each case the bonds, by express provision on their face, are not available as commercial paper until they are guaranteed by the company's officers, under the company's seal. Provision is made for registration for the purpose of facilitating negotiation, and this registration is to be made not in Connecticut, but at New York City. In each case the principal sum is split up into the same convenient parts of $1,000 each, with the evident purpose of making the security one easily available as an article of commerce at the great money center, New York. Of the intent to make these bonds articles of commerce in this way, conclusive evidence is afforded by the fact that all of them have been guaranteed by the Equitable Trust Company, the only means by which they could be made negotiable. Now, a security bearing only 7% could not have been meant for use in Illinois, where 10% securities were at that time not only lawful, but common. The funds loaned were at New York, being obtained by draft on New York. The trustee in the trust deeds was a resident of New York. There is no evidence whatever that the money when obtained was to be used in Illinois.

Complainant's charter (Rec., p. 60, Sec. 2) permitted it to "have such officer and agencies in other states as "may be necessary for the transaction of its legitimate "business," and accordingly it maintains an agent in Illinois, *but only the officers in New York have power to make binding contracts for loans.*

A security intended for negotiation and use, as such, at a certain place should be governed by the laws of that place. These bonds received their final shape and character in New York and were intended evidently for cir-

culation there. These facts have always been deemed most significant in determining the *locus* of a contract.

Dickinson v. *Edwards*, 77 N. Y., 573.
Wayne County Bank v. *Low*, 81 N. Y., 566.
Merchants Bank v. *Southwick*, 67 How. Pr., 328.
Tilden v. *Blair*, 21 Wall., 241.
Gay v. *Rainey*, 89 Ill., 225.

In this case the lender derived all the advantages which were incident to the contract as a New York contract, whereas the borrower was subjected to the same inconveniences which would attend a contract foreign as to him. For instance, in obtaining the money from New York the defendants had to pay exchange. Further, they were subjected to the extra cost incident to dealing with the agent, Johnston, instead of directly with the company itself, as it might have done, had the latter been located in Illinois, or had it there maintained an agent capable of making a binding contract for it.

We have nothing to fix the character of this contract as an Illinois contract, save the facts that the borrowers resided in Illinois, that the land given as security lay in Illinois, that the interest adopted as a part of the contract (but not as a part of the bonds) was lawful in Illinois, and, finally, that the papers were signed in Illinois. But, as a matter of fact, *the contract* was made, the terms were fixed, when the company in New York finally approved of the title, approved of the papers, and accepted the written application. The subsequent execution of bond and trust deed simply evidenced a contract already made. The bargain had become binding before any of the bonds

or trust deed had been signed. The application, stating all the material terms of the loan, was in writing and had been accepted in writing.

In *Western Transpn. Co.* v. *Kilderhouse*, 87 N. Y., 430, the minds of the parties had met and the terms of their agreement been substantially arranged at an interview held in Michigan. The understanding thus arrived at was that the debt should bear ten per cent. interest; which was lawful in Michigan, where the creditor resided, and that promissory notes should be executed to secure the debt. The debtor residing in Buffalo, New York, the creditor sent his agent there subsequently to obtain the notes, and they were there executed and delivered to the agent. But they bore only seven per cent., the New York rate, the maker paying to the agent enough cash to make up the difference and raise the rate to ten per cent. *Held*, that these notes were but evidences of a *previously made contract*, and that the mere fact of their execution and delivery in Buffalo did not require the transaction to be governed by the New York statute, and, consequently, the notes were enforced.

"The point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

DeWolf v. *Johnson*, 10 Wheat., 383.
Story Confl. L., (7th Ed.), Sec. 287.

No tender of this money in Illinois would have sufficed to satisfy this mortgage. The lender could have insisted that tender must be made at its office in New York.

In the case of *Milliken* v. *Pratt*, 125 Mass., 374, the defendant was a married woman, residing with her husband in Massachusetts. The plaintiffs were residents of and in business at Portland, Maine. The defendant's husband applied to plaintiffs for credit, and they required of him, as a condition of granting the same, that his wife, the defendant, should guarantee the loan. Accordingly the writing was drawn up, dated Portland, and guaranteeing the payment of the debt, and signed by the defendant in Massachusetts, and mailed from Massachusetts to the defendants in Portland, and by them there received. By the laws of Massachusetts at the date of said guaranty a married woman could not lawfully make such a contract; whereas, by the laws of Maine, she was authorized to do so. The question, therefore, was, whether the laws of Maine or Massachusetts applied in a suit brought on the contract in a court of Massachusetts. In an elaborate decision, Chief Justice GRAY held that contract to have been made in Maine, and therefore governed by the laws of that state, and enforceable in the courts of Massachusetts.

"Where an agent, having no authority to complete a contract, obtains orders in a foreign state, which orders he forwards to his home principal, who accepts and fills them, the seat of the contract is the state in which the principal resides, that being the actual place of sale."

Whart. Confl. of Laws, 2nd ed., Sec. 406.

In *Hyde* v. *Goodnow*, 3 Comst. (N. Y.), 267, the same rule was announced.

In the case of *Parken* v. *Royal Exchange Assurance*

Company, 8 Dunlop (Scotch) Session Cases (second series), 365, a domiciled Scotchman made proposals for insurance upon the life of another Scotchman, with an English insurance company, through the company's agents located in Edinburgh, and thereafter received a policy which was prepared at the London office, and then transmitted to the Edinburgh agents, by whom it was there delivered to the plaintiff, and to whom, also, the latter paid the premiums. In an action against the insurance company for the amount of the policy *and interest*, (the Scotch law allowing interest on such claims), it was *held*, that "the contract was English in respect that the "Edinburgh agents were not possessed of authority of "themselves to conclude contracts binding upon the com- "pany, and that it must, therefore, be regulated by the "laws of England, according to which interest could not "be demanded upon the sum in the policy." A Scotch court accordingly denied a right which the Scotch laws would have recognized. In delivering their respective opinions, the judges spoke as follows:

LORD JUSTICE CLERK: "Is this contract to be regulated by the law of England or of Scotland, in matters relating to its nature and the liabilities under it? * * * On the one hand it was distinctly admitted, as the basis of the argument, that the agent of this company in Edinburgh had no power to accept and take risks without reference to the head office, and that they determined on and accepted the same—the proposals being only transmitted by him, with his own opinion as to the propriety of acceptance. On the other hand, it was admitted that the policy, when completed, was sent by the office in London to their agent here [in Scotland], and that the policy was delivered by him to the insured, and the premium paid *simul et semel*. On that state of facts it does not admit of dispute that neither party was bound, that is, the contract was not completed, until the policy was delivered and the

premium paid. The agent had clearly authority, although not expressed in instructions, to retain and withhold delivery, if anything material had come to his knowledge; the insured was entitled to change his mind, having only made a proposal for insurance. But what, then, in point of law? The party in Scotland wishes to insure a life with a London company, and his proposal is transmitted. He must receive a policy in English form, executed and binding by the form necessary by the law of England. That he contemplates and means, to that effect he is entitled, if his offer is accepted, the Scotch agent not undertaking and not being entitled to bind the company. Then, further, it is this London company who are to assure him on the risk. Although the life may be in Scotland, or the party insuring it, yet it is an undertaking in England—the company do the business of insurance there—there they undertake the risks; there they insure, so far as the business has locality. The corporation is bound there, and its stock and funds. *The delivery of the policy is only the delivery of the document of debt by which each becomes mutually bound and by which the assured holds the proof of the obligation;* but the thing generally is to insure in England, and that the party does."

LORD MONCREIFF says: "Where was the contract sued on situated, and what is the place of payment or performance under it? I apprehend that the mere circumstance of this contract having been transmitted through or by the hands of an agent at Edinburgh cannot have the effect of changing that which was, in its nature, essentially an English contract, made under the law of England, into a Scotch contract, to be ruled in its nature, construction and effects by the law of Scotland."

LORD COCKBURN says: "It is admitted now that the agent who acted, to a certain extent, for the defendants in Edinburgh had no power to complete the insurance. He was a mere hand to transmit, very probably with his opinion of them, proposals and to receive and deliver policies. He did nothing but what might have been done by the post-office. Yet this was all that was Scotch in the transaction. It is said that it is delivery that completes such a contract, and that here the delivery was the legal one. True; but what was delivered?

An English contract: a policy granted by a company having its place of business in London, executed according to the forms of the law of England and bearing no reference to any foreign *locus solutionis*. The delivery or the acceptance of such a deed did not make it express a contract according to the law of France, America, Holland, or Germany, or wherever the insurer happened to receive the *ipsum corpus* of the writing."

See also *Lamb* v. *Bowser*, 7 Biss., 315 (Judge Gresham); same case on appeal, 7 Biss., 372 (Judge Drummond).

In *Williams* v. *Fitzhugh*, 37 N. Y., 471, the land was in Ohio, and the mortgagor resided there, and the mortgage was there executed, but the note was payable and the money was loaned in New York at a rate of interest valid in Ohio, but not in new York. *Held:* A New York contract, and void under the New York law.

Stapleton v. *Conway*, 1 Ves. Sr., 427.

Lockwood v. *Mitchell*, 7 Ohio St., 405.

The business place of the creditor is of much more significance in determining the *locus* of the contract.

Varick v. *Crane*, 3 Green Chy., 133 (N. J.)

II.

EVEN UNDER THE ILLINOIS STATUTE, ALLOWING TEN PER CENT., THESE CONTRACTS ARE USURIOUS.

THE E. S. FOWLER LOAN—$9,000 for 5 years, at 10%.

Fowler received the money on February 23, 1874. The amount that he actually received was $7,809.69. Of this amount he paid $100 to Johnston for commissions. On May 1, 1879 (the maturity of the loan), he had had the use of $7,709.69 for five years, two months, seven

days. To satisfy this debt, therefore, he should have paid up to May 1, 1879, as follows:

10% on $7,709.69, 5y., 2m., 7d.	$ 3,998.76
Principal sum (actually received)	7,709.69
Proper total	$ 11,708.45
Usurious mode adopted by complainant:	
7 per cent. on $9,000, 5 yrs.	$ 3,150.00
Plus fictitious principal (being $1,290 31 more than was actually loaned)	9,000.00
Improper total	$ 12,150.00
Usurious excess	$ 441 55

(We do not mean that $12,150 is the exact sum here claimed by complainant, but that it demands, independent of its advances for taxes, etc., at least the sum mentioned, arrived at by the process described.)

Even if Johnston's commissions be not charged against the complainant, yet there would be a usurious excess of $290.13.

We proceed further to analyze Johnston's methods of calculation.

Johnston calls the sum of $1,042.20 "three per cent. discount from May 1, 1874, to May 1, 1879." It will be observed that this sum is not three per cent. *interest* on $9,000 for five years. That would be $1,350. This $1,042.20 is the *present worth* of $1,350 for five years at *six* per cent. Now, to obtain the discount, Johnston's method was, in part, correct. That is, instead of taking the whole $1,350, he would under no circumstances have had a right to take more than the "present worth" of the latter sum, viz: such a sum as, if put out at interest for five years, would produce $1,350. Such a sum is what

is known in the books as "true discount," as distinct from mere "bank discount," which is simple deduction of interest in advance. But it will be noted that on this *ten* per cent. loan Johnston calculates this present worth not at ten per cent., but at *six* per cent. If this "present worth" had been calculated at ten per cent., the sum deducted in advance here would have been only $900, instead of $1,042.20, thus making a difference (by Johnston's method) of $142.20 in favor of complainant. In other words, since it takes a larger sum to produce a given amount when the interest is at six per cent. than when the interest is at ten per cent., and since it was to complainant's interest to make as large as possible the sum deducted in advance, Johnston adopted the six per cent. rate, instead of the ten per cent. This destroyed the uniformity of the rate and created a disproportion. If the defendants were being charged ten per cent. upon sums that they had to pay, the complainant should be charged the like amount in calculating the discount. The theory, and the only theory, upon which Johnston could be justified in using the six per cent. rate must have been that the company could only get six per cent. interest upon the sum thus deducted in advance; whereas, in its dealings with these defendants it was, in fact, obtaining ten per cent.

Again, three per cent. interest on $9,000 for five years is only $1,350. By deducting $1,042.20 in advance the company, had it loaned that sum out at *ten* per cent. for five years, would have received at the end of that time in payment $1,563.30. Thus there was a difference of $213.30 in favor of deducting the three per cent. in advance instead of receiving it at the maturity of the loan.

Another instance of an effort at overcharge against these defendants is this: In calculating the amount to be

paid over to the borrower on February 23, 1874 (which was sixty-seven days prior to the date when, in fact, the bonds began to run), Johnston deducted the sum of $148.11 as being the interest for sixty-seven days. This interest he calculates at 360 days to the year (which is *the New York method*, by statute, but not the Illinois rule). If calculated at 365 days to the year this amount would have been only $146.42.

Another instance of improper methods of calculation, operating unjustly against the borrower, is this: Dr. Fowler's bond did not begin to bear interest until May 1, 1874. But he received the money sixty-seven days beforehand. Johnston, therefore, had to estimate what sum, paid on February 23, 1874, would be the equivalent of $7,957.80, payable sixty-seven days thereafter. Of course the only correct method would have been for him to find what sum put at interest for sixty-seven days would produce $7,957.80. Instead of this Johnston simply deducts $148.11, which is simply the interest on $7,957.80 for sixty-seven days, at ten per cent. (360 days to the year), just as if the doctor had received $7,957.80 on February 23d, and was, therefore, bound to pay interest on it until May 1, 1874!!

This is not the case of a loan of $7,957.80, made on February 23d, and payable sixty-seven days thereafter. In such case the interest might have been taken in advance; but at the end of the sixty-seven days the debtor could have ended his liability by simply paying $7,957.80 without any addition for interest. But in the case at bar it is part of the original contract that at the end of the sixty-seven days the $7,957.80 is not to be repaid, but is to remain and bear interest at ten per cent. for five years longer. Thus the

$148.11 deducted by way of interest in advance becomes itself a part of the principal, and is to be paid a second time when the loan matures, and is also made to bear interest meanwhile.

Again: If this interest had been calculated at six per cent. (as was done in the case of the $1,350, because then it was to complainant's advantage to use the lower rate), in that event Dr. Fowler would have received $7,869.89, or $60.20 more than he did receive.

THE ROSE H. FOWLER LOAN—$6,000 for 5 years at 10%.

Substantially the same methods are applied and the same usurious results follow in this case as in the E. S. Fowler case. Mrs. R. H. Fowler actually received from complainant only $5,381.83, and this was received not on the date of her bonds, May 1, 1874, but on June 22, 1874. Of this amount she repaid to Johnston $150 as commissions. When the bonds matured, therefore, on May 1, 1879, she had had the use of $5,231.83 for a period of four years, ten months and eight days. By a proper method of calculation the debt should have been satisfied as follows:

10% on $5,231.83 for 4 yrs., 10 mos., 8 ds.	$2,539.97
Principal actually received and payable at maturity	5,231.83
Proper total	$7,771.80

By the usurious methods of complainant the following was the calculation:

7% on $6,000 for five years	$2,100.00
Principal payable at maturity	6,000.00
Usurious total	$8,100.00

(We mean that *at least* $8,100 is charged and will naturally result as the amount due from the methods of calculation adopted by the complainant.)

Usurious excess..... $328.20

If the agent's commissions, $150, be not charged against the complainant, the usurious excess will nevertheless amount to $253.

Again, as to Johnston's methods of ascertaining the "discount." The amount he deducted in advance as being "discount—three per cent.—five years" on the $6,000, was $694.80. The interest at that rate for that time would have been $900, and Mr. Johnston took the present worth of this $900. In this case, also, the company, in calculating this present worth, acts upon the theory that by retaining this $694.80, it can put it out at interest, so that by May 1, 1879, the principal and interest thereof will amount to $900. But here again Johnston calculated this interest at six per cent.; that is, upon the supposition that the complainant could only get six per cent. for its $694.80. Now, this loan was to the defendant at ten per cent., and, if this were an Illinois loan, that was a lawful and not unusual rate. Having exacted that rate of the defendant, Johnston's calculations should have proceeded uniformly on that basis, because otherwise the proper proportion between the rates is not maintained, and the result is necessarily an excessive charge beyond what would have resulted from consistency in this respect, that is, from observing a uniform rate of ten per cent. If the present worth of this $900 had been calculated upon the supposition that the company could get ten per cent. instead of six per cent. for its money, as in this case it was doing, then the sum deducted in advance would have been only $605.81, instead of $694.80. That is, the

present worth of $900 for four years, ten months, eight days, at ten per cent. is $605,81, and if any sum was to be deducted in advance it should have been only $605.85, and not $694.80.

It will thus be noted that there is in each of these cases observed but one uniform rule, and that rule is the lender's own advantage. When six per cent. suits its interest, six per cent. is adopted as the rate of calculation. When ten per cent. is better for it, it adopts ten per cent. Now, although the sums involved as the necessary result of these variations in the methods of calculation are but small comparatively, yet they are most significant as indicating a deliberate purpose to adopt an improper method of calculation for the purpose of constituting an excessive charge against the defendants. These things are not accidents, but are the result of a deliberate choice of methods, which necessarily result in usury.

The following is a decision under the New York statute which enforces the severe penalty of an entire avoidance of the contract.

"The payment and receipt of usurious interest is *prima facie* evidence of a corrupt agreement. It must be conceded that more than seven per cent. per annum was received upon the discount of the note in this case. How was the presumption of law, that it was received in pursuance of a corrupt agreement, sought to be repelled? Not by showing that the sum paid for interest was greater than the parties intended should be paid, that there was a mistake in telling the money, or that the clerk who cast the interest had fallen into an arithmetical error; but by showing that the excess arose from the *adoption of a principle of calculation* which the party knew would give more than seven per cent., though they believed it was not in violation of the statute. In other words, the plaintiffs received more than seven per cent., because they believed that they had a legal right to re-

ceive more. If they judged erroneously, it was a mistake in a point of law and not in point of fact; and unless there be something in the case of usury to distinguish it from all other cases, their ignorance and mistake in relation to the law can afford them no protection."

Bank of Utica v. *Wager*, 2 Cow., 712.

"The taking of usurious interest is *prima facie* evidence of a usurious contract."

1 Saunders (Williams' Notes), p. 295b., note 1.

Reinback v. *Crabtree*, 77 Ill., 188.

THE SOPHIE FOWLER LOAN—$10,000 for 5 years, at 9%.

In this case the excess over seven per cent. (that is, the two per cent.), instead of being deducted in advance, was put into ten separate promissory notes (each for $100), one falling due every six months. A commission of $150 was paid to Johnston. Each of the two trust deeds provides for the payment by the debtor, in case of default, of a solicitor's fee, and for insurance. If Johnston's commission of $150 be charged against the lender, then it is plain that for the *first year* of this loan the complainant received $50 more than ten per cent. interest. To obviate this objection, its counsel, in the court below, insisted that this commission should be considered as divided into five equal portions, so that the same should be spread over the entire period of five years for the purpose of estimating the rate of interest charged. We know of no rule of law or common sense that would require this to be done, the only logical consequences of such a doctrine being that the *exaction of any sum whatever* in advance may be justified, however great, provided only the rate evidenced by the note or security be short (though but by a hair's

breadth) of the statutory limit, and provided the time of the loan be long enough. The amount, $150, was paid in a lump sum on the day the loan was consummated. The complainant, through its agent, had the entire benefit of such advance payment, had the use of that whole sum during the whole period of the loan, and the borrower was deprived of such use from the time of its payment. Johnston's services were not of a continuing character; they ceased with the consummation of the loan. His commission was then and there earned. If, by the contract between him and the borrower, the payment of the commissions had been distributed over the whole time, so much to be paid each year, so that the advantage of such distribution had accrued to the borrower, then the complainant's contention in this regard might have something of substance in it. But the commissions were demanded in one entire sum in advance at the inception of the loan, and must, therefore, in the absence of any agreement to the contrary, be treated as relating to that period alone.

But, in addition to this, we have the covenants calling for a reasonable solicitor's fee in *both* the trust deeds. Under the covenants of the second deed it would be possible to charge the borrower with two solicitor's fees by reason of default in the bonds alone, since the latter trust deed can be foreclosed as well for default in the bonds as on the interest notes. Again, the first trust deed calls for full insurance for the benefit of the bondholders. The second deed requires insurance also "as "*further* security" for the holder of the interest notes. The proceeds of policies, in case of loss, are to go to *both* sets of creditors. Upon all advances made to keep up this *double* insurance the lender is to receive interest.

All this insurance is to be placed through agents selected by the lender and by such agents "supervised."

Now usury consists not only in "a profit made" by the lender, but also in a "loss imposed on the necessities of "the borrower, whatever form, shape or disguise it may "assume."

U. S. Bank v. *Owens*, 2 Pet., 527.
Bonus v. *Trefez*, 2 Atl. Rep., 372.
Clagne v. *Creditors*, 2 La. Rep., 114.

In such case as this, with such evidences of oppressive and exacting spirit on the creditor's part a court of equity will be asked to discover means to balk him of his unjust purpose.

Sherman v. *Gassett*, 4 Gilman, 524.

Now the first trust deed provided for a solicitor's fee of *five* per cent. This is construed by complainant as meaning five per cent "upon the amount found to be due." (See Bill of Complaint, Rec., 20.) The second decree below awarded this full five per cent. (viz: upon $18,469.86, principal and interest due on January 11, 1887, making a fee of $923.49. Rec., 79.) Now this "five per cent." is not merely five per cent. of the sum loaned—$10,000—but is calculated (and under the term of the contract must be calculated) upon the principal *with interest thereon added*. This "five per cent," therefore, if distributed over the *entire* period of the loan, would raise the rate to more than ten per cent. (since nine per cent. is charged as the contract rate for the five years and ten per cent. for the whole period *after* maturity.)

It is true that some courts have held it to be no violation of the usury statute to provide for an attorney's fee in the event of default. But this cannot be meant to save

every exaction that the lender may be pleased to term "solicitor's fee."

"Undoubtedly a provision for an unreasonable and extravagant sum would not only be an evasion of the usury laws, but it could be set aside or reduced independently of these laws, under the general power which courts of equity exercise in regard to oppressive terms imposed by the creditor on the necessitous debtor."

McAllister's Appeal, 59 Pa. St., 207.
(SHAREWOOD, J.)

Here the *same contract*, through its different *parts*, provides for *two* solicitors' fees. The Equitable Trust Company is the beneficiary in both these trust deeds. It holds both the bonds and the interest notes. The second trust deed entitles it to begin foreclosure proceedings for default *on the bonds*, even though the interest notes may not be due, or may be promptly met.

Here then are *two* foreclosure suits provided for in the same contract, *to enforce the same debt*, and in favor of the same person. Now while a court of equity might not, in favor of the Equitable Trust Company, enforce such a provision, still the provision exists and is a part of the contract, and if its effect is to make the contract usurious, the court cannot disregard it as surplusage, but must treat the whole contract as void. It matters not that the Equitable Trust Company may not here insist upon a double foreclosure or a double fee for solicitor's services. The only *contract* between the parties was one which entitled it to make such a demand, and "it is entirely immaterial whether the unlawful excess was actually paid "or only promised to be paid; it was all one transaction "or contract, and the whole was void. * * * The "lender cannot waive or abandon the usurious agreement,

"so far as it is illegal, and enforce it as to the residue." (*Hammond* v. *Hopping*, 13 Wend., 511.) Suppose these interest notes were in the hands of innocent purchasers: Could not *they* enforce this provision, virtually exacting two fees and also double insurance?

Here, then, the holders of these interest notes, *without waiting for any default on those notes*, the debt thereby evidenced may be due, might subject this defendant to this extra expense. The interest notes contain no promise, express or implied, to pay the *bonds*, either principal or interest. It would constitute no default whatever *on the debt evidenced by those* NOTES to omit to meet the *bonds* or *coupons* at maturity. The exaction of an attorney's fee for foreclosing on the *notes* for default on the bonds cannot be construed as a mere penalty for default in meeting the debt. *Such extra charge could not be avoided by paying the notes, however promptly.* The courts, when they ruled that such a charge was a mere penalty for default and not usury, cannot be understood as meaning that there might be *two penalties* lawfully provided for the *same default*, and that the lender might thus escape the consequences of his attempt to impose unlawful burdens upon the necessities of those for whose protection the usury statutes are enacted.

This attorney's fee becomes a part of the decree and belongs to the Equitable Trust Company, not to its solicitor.

The only event in which a beneficiary under the *second* deed could find it necessary to his own protection to begin a foreclosure suit and so incur the expense of a solicitor's fee, would be in case of default on the *interest notes*, not for default on the *bonds*. It could not concern the holder of those notes, as such, that the bonds were not paid. If

the bondholder should begin suit, he would be obliged, in order to cut off or in any way affect the holder of the *notes*, to make such holder a party to the suit. Now, if so made a party, the note-holder would have no occasion whatever in Illinois (where this land lies and where alone the suit could be brought) to employ an attorney. No bill, cross-bill, or even answer, would there be necessary in order to secure the note-holder's right to his share of the proceeds of sale. If made a party, the court would take notice of his rights.

If not made a party, his rights would not be impaired.

Ellis v. *Southwell*, 29 Ill., 549 (1863).
Derrick v. *Lamar Ins. Co.*, 74 id. 404.
Walker v. *Abt*, 83 *id.*, 226.
Edgerton v. *Young*, 43 *id.*, 464 (1867).
Walker v. *Abt*, 83 *id.*, 226 (1876).

This very question—as to the unreasonable character of a stipulation for an attorney's fee in case of a subsequent lien-holder—is passed on in *Sole* v. *Sheppard*, 99 Ill., 620, where the court distinctly intimates that such a stipulation may constitute a mere "cover for usury," even when it is confined to a foreclosure incident to a default in the very debt secured by the junior lien. In the case at bar, the lender, with knowledge, it must be presumed, of the Illinois law (with reference to which it here insists the contract was made), reserves to itself the right to burden the borrower with the costs of a foreclosure under the second mortgage, even though there was no default on the debt which that mortgage secured, and though the prior lien-holder might not see fit to foreclose under his prior mortgage, and even though the note-holder could in no way be injured, unless such prior lien were foreclosed

and the note-holder made a party to the foreclosure, and, finally, notwithstanding the fact that, even in that event, no solicitor's fee would really be necessary. Could the insertion of such a stipulation have any object other than the exaction of a gratuity in addition to lawful interest? It is no answer to say that the courts will not enforce such a stipulation, and that, accordingly, it can do no harm. Neither will the courts enforce any other usurious claim, but that fact does not relieve the transaction of the taint.

Again, if foreclosure is not resorted to, yet the second trust deed empowers the trustee to advertise and sell for default on *any instalment of interest on the bonds* (even though no default at all on the *notes*), and in such event, to sell *subject to the first deed*, and to charge *commissions* therefor, to be fixed at the same rate as sheriff's commissions on execution sales. (Rec., pp. 29–30.) Now sheriff's commissions were then (1876) charged at the rate of three per cent. on the purchase price up to $200, and one and a-half per cent. on all over that sum.

Hurd's Rev. Stat. Ills., 1874—Ch. 53, § 19, p. 511.

This property was an improved tract of 340 by 358 feet, in the city of Springfield, the state capital. The bonds (put upon the market and guaranteed by the complainant itself) recite that the property is "valued at *not less than* $25,000." (See recital at end of each bond.) The loan was for $10,000. The buildings alone were insured for $7,500. (See "Exhibit H" to Johnston's deposition, Rec., 65, 66.) Thus the value exceeded by $15,000 the principal of this loan. Now, under this second trust deed, suppose defendant, while duly meeting the first interest note, had defaulted on the first *coupon*,

there would then have been due under the first deed only the principal sum, $10,000, and the coupon on which default was made, $350, total, $10,350. Now, is it not fair to presume, in the absence of contrary proofs, that at a sale under the second trust deed, this land would sell for its value less the sum secured by the first deed, that is, say $14,200? If so, then the trustee in this second trust deed could exact a commission of at least $216 for enforcing the collection of the remaining interest notes, viz: *nine hundred* dollars.

The trustee, Jonathan Edwards, *was the president of the complainant company*. (See the guaranty attached to each bond.)

Now, it is true, we have no means of establishing *with certainty* what the purchase price would have been at such a sale, nor are we here concerned to do so. All that can be required of us is that we shall convince the court that by virtue of the contract there was a chance of profit to the lender or loss to the borrower over and beyond what would have resulted from the payment of the highest legal rate of interest.

Again, under the strict terms of this second trust deed, the lender would have had the right to advance *premiums for insurance, over and beyond the insurance required by the first deed*. Now, the evidence shows what such advances would have been, if they had been made. The master's report of January 11, 1887, (Rec., 78) shows that complainant paid premiums each year of $32.50. As against it, we are entitled to presume that this was a proper and reasonable amount. The second deed does not limit the amount of insurance, but requires "*all* buildings that may at any time be on said premises during the continuance of this indebtedness," (not even "ex-

"cepting outhouses," as in the first deed.) If the lender (or the holder of the interest notes) had paid these additional premiums during the period of the loan, the amount demandable on this account at maturity would have been:

$32.50 and 5 yrs.' interest at 6% (the second deed providing for interest also)	$ 42 13
$32.50 and 4 yrs.' interest	40 30
$32.50 and 3 yrs.' "	38 35
$32.50 and 2 yrs.' "	36 40
$32.50 and 1 yr.'s "	34 45
Total	$191 63

Or, if defendant herself had paid these premiums in compliance with the second trust deed, she would have paid the same amount, of course. To this sum must be added Johnstone's commissions, $150, making a total of, at least, $341.63, over and beyond the nine per cent. interest agreed to be paid. To this again must be added a "reasonable solicitor's fee," demandable under the second trust, even though there be no default on the notes secured by such deed.

Deducting Interest in Advance.

Our contention here is that it is usury for one who is not a banker to deduct interest in advance at all on a mere loan, as this is, and not made in the course of trade as a merchant; or, in any event, to deduct more than *one year's* interest in advance. We have shown how the deduction of $694.80 in advance in the R. H. Fowler case results in an excess over the lawful charge. Whether this sum be looked upon as the "present worth" of $900

due in five years, and the rest of the ten per cent. (that is, seven per cent.), to be paid annually: or whether the $694.80 be regarded as one year's interest at ten per cent. deducted in advance: in either case it is at least $95.80 too much; $694.80 is more than ten per cent. "discount" for one year; it is more than the "present worth" of three per cent. for five years, where the loan is at ten per cent., as here. Now that the right to deduct interest in advance by way of discount must be subject to *some* restriction will make itself apparent upon the slightest consideration. If three per cent. for five years may be deducted in advance, then why not ten per cent. for ten years, in case of a loan for the latter period? If so, how much would the borrower receive on account of the loan? Nothing whatever, and would yet be bound at the end of ten years to pay to the creditor the principal sum! Now, it is true, whether by general usage or by express language of the statute, that the right to "discount" is recognized in Illinois and elsewhere, and that "discount" does mean the deduction of interest in advance. But all laws must receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. Let us see to what extent the right to deduct interest in advance has been recognized by the courts. In 1601, in the opinion of all the judges of England, an agreement made at the time of the inception of the loan, to take any of the interest in advance, constituted usury.

Barnes v. *Warlich*, Cro. Jac., 25.
See 2 Cowen, 767.
3 Bos. & Pul., 159.
Ord. on Usury (1809), 102.

Such was the law as adopted by the Illinois statute of February 4, 1819, declaring that the common law of England and statutes there in force prior to the fourth year of James I., shall be the rule of decision. (Revised Laws of Illinois, 1833, p. 425.)

Thomson v. *Weller*, 85 Ill., 198, 199.

See Justice Field's remarks in *Munn* v. *People*, 94 U. S., 153.

In the case of *Bank of Utica* v. *Wager*, 2 Cow., 769, it is declared that, "This privilege of deducting the interest by way of discount is confined to bankers, at least "in England." And so the cases of *Fleckner* v. *Bank*, 8 Wheat., 338; *Thornton* v. *Bank*, 3 Pet., 36, and *Manhattan Co.* v. *Osgood*, 15 Johns., 168, are expressly founded upon the practice among *bankers*. (See *Bank of Utica* v. *Wager*, 2 Cow., 767.)

In *Hogan* v. *Hensley*, 22 Ark., 414, the foregoing cases in 2 Cowen, 3 Peters, 8 Wheaton and 15 Johnson, are all cited, and their result is declared to be as follows: "There "are cases where it has been held that bankers, and those "dealing in bills of exchange, or promissory notes, by "way of trade, are allowed to take interest in advance, "though by so doing it exceeds the legal rate, but this "privilege has been uniformly confined to such persons, "and may be regarded as an exception to the general "rule." And, consequently, in that case, the reservation of interest (by the Internal Improvement Commissioner authorized by statute to loan the State funds) so as to make it payable semi-annually in advance was held to be usurious.

"Such a transaction on a bill of exchange, in the way of trade for the accommodation of the party desirous of raising money, is not usurious. In such case the addi-

tional sum seems to have been considered in the nature of compensation for the trouble to which the lender is exposed; and unless that indulgence were allowed it might not be worth while for any merchant to discount a bill. If then nothing more has been done in this case than what has always been done by way of accommodation among merchants the transaction is not usurious; but the rule must be confined strictly to that sort of a transaction."

Marsh v. *Martindale*, 3 Bos. & Pul., 158.

"The general rule of law is that if the interest be retained at the time of the loan, or be stipulated to be paid before it regularly falls due, the contract is usurious." But in favor of trade, an exception is allowed in the case of discount of bills. This exception is restricted to discount in the ordinary course of trade, when the excess of charge is fairly referable to the trouble and expense to which the merchant or banker discounting is exposed."

Byles on Bills (7th ed.), 315 (5th ed.), 302.

"The ordinary way of discounting notes and bills by taking the interest in advance out of the sum paid is undoubtedly usurious in the strict sense of the word; for the lender receives interest on the whole for a loan of a part. It is obvious that there must be some limit to this practice, as the usury is the greater in proportion as the period for which discount is taken is longer. Therefore, the courts declare their intention to confine this deduction of interest to the discount of notes and bills and of such as have not an unusually long period to run."

2 Parsons N. & B., 421, 422.

Kelley on Usury, *41, *43.

"The case of *McGill* v. *Ware*, 4 Scam., 21, only decides that the creditor may reserve legal interest *for a year* at the time of the loan. It was decided upon the authority of adjudged cases in other courts, where the agreement for usurious interest worked a forfeiture of the whole debt. And that case was under a statute which declared a forfeiture of threefold the whole amount of usurious interest reserved. To avoid such heavy penal-

ties, courts have ever given such laws a strict construction, and *it may well be doubted whether such decisions would have been announced had the forfeiture been no more than the interest.*"

Hamill v. *Mason*, 51 Ill., 491.

"We regard the toleration of taking interest in advance at the highest rate allowed by law, as an artificial rule resting upon long usage unsupported by any sound reasoning, and cannot consent to take that artificial rule as the basis of a philosophy by which a like rule may be extended to a case not within the artificial rule."

First National Bank v. *Davis*, 108 Ill., 638.

3 Pars. on Contracts, *131–*132.

In the last named case Justices SHELDON and CRAIG state the result of *Mitchell* v. *Layman*, 77 Ill., 525: *Goodrich* v. *Reynolds*, 31 Ill., 490, and *McGill* v. *Ware*, 4 Scam., 21, to be that "there is no usury in taking the "legal rate of interest in advance *for no longer time than* "ONE YEAR."

In *New York Insurance Co.* v. *Ely*, 2 Cow., 678, interest was deducted in advance on a *ninety day* note, and the court remarks as follows:

"In *Marsh* v. *Martindale*, LORD ALVANLEY, expressly admits this [the right to discount interest in advance] to be the established law in relation to the negotiation of bills of exchange made in usual course of trade: *but he held the transaction in that case to be usurious principally because the bill discounted was a bill at* THREE YEARS." * * * "It must, therefore, be a negotiable instrument and *payable at no very distant day*, for without these qualities it will not circulate in the course of trade. Under these limitations the taking of discount in advance is not usurious." Commenting on the same case, *Marsh* v. *Martindale*, a text-writer says: "The court determined that as the bill was for *so long a time* [three years], coupled with its being the redemption of an annuity, it was evident that the transaction *was not a discount in the*

way of trade, but a loan of money, a method of obtaining more than legal interest, which was corrupt in law, whatever the intention of the parties."

3 Pars. Cont., *132, note.

In the case in 8 Wheaton, 341, the note discounted was a *six months'* note. In 3 Peters, 36, the note was for *sixty-four days*. See further, 1 Edwards on Notes and Bills, Sec. 500.

"The discounting of a bill of exchange *at a very long date*, as for example, *two or three years*, seems of itself a suspicious circumstance; and if done as an artifice to obtain more than legal interest, the transaction would be usurious, and the bill and any substituted security will be void in the hands of the discounter against all parties."

Byles on Bills (7th Ed.), *315; (5th Ed.) *302.

In the case of the *Penn. Mutual Life Insurance Company* v. *Carpenter*, 39 Ohio St., 264, an insurance company loaned to B the sum of $12,000 for three years at eight per cent. interest per annum. The interest was payable annually in advance. The company retained $960, one year's interest, and took B's two notes for $960 each, payable in one and two years after date, for the interest on said loan for the second and third years respectively. Said interest notes were paid at maturity at the beginning of the second and third years respectively The statute of Ohio then in force provided that "the "parties to any bond, bill, note, etc., may stipulate for the "payment of interest at any rate not exceeding eight per. "cent. per annum payable annually." It was *held* that the above contract was usurious on account of each year's interest being paid *in advance*. The court there said:

"It is contended by the counsel for plaintiff in error that the statute fixed the rate of the interest and not the

time of payment, and that, as a contract to pay the rate semi-annually is not usurious, there is no principle that would prevent the contract from providing for the payment of the rate annually in advance. This means neither more nor less than that the borrower may be bound to pay interest at a stipulated rate of eight per cent. per annum upon money of which he has never had the use, and yet the contract be free from usury. Interest for money is the reward or compensation which is paid by the borrower to the lender, or by the debtor to the creditor for for its use. If it is paid in advance, or deducted at the time of the loan, the principal of which the borrower is to have the use is reduced *pro tanto*, and the lender should not be compensated for the use of money which, in fact, he has not loaned. For illustration: B borrows and gives his note for $12,000, payable in one year after date, with interest at eight per cent. per annum, and the interest is deducted in advance. He receives only $11,040, which he uses for one year, but as compensation therefor he pays the stipulated rate of interest on $12,000. By computation it will be seen that he has paid interest at the rate of 8 68/100 per cent. on the amount which he actually received; he has lost the use of the $960 held back by the lender, which he would have had if the interest had been payable only after it had accrued or been earned. His payment of interest on the sum so deducted is without consideration and solely for the benefit of the lender. A construction of the language of the statute as applicable to the *rate* of interest only, and not to the time of payment, which will permit the payment of interest at periods shorter than the time a note has to run, furnishes no resonable ground for the advancement of interest before it accrues or is earned. * * * *The loans by banking institutions being for short periods*, and the difference between discount and interest being, in consequence, so inconsiderable, it is not unreasonable that the legislature should distinguish between private lenders and banks and those who deal in commercial paper by way of trade. *It is quite obvious that unless the practice of deducting interest in advance is limited to* SHORT *loans*, as by bank discounts, *the usury will become greater in proportion as the period for which the usury is taken becomes*

longer. Thus, in a loan of $1,000 for 12½ years at 8%, paid *in advance, the principal will be exhausted in the interest deducted*, and the borrower will receive nothing!"

We submit that the books furnish no precedent for a case, in which, as here, interest has been deducted in advance for considerably more than the period of one year.

As to Johnston's Commissions.

Dr. Fowler says: "I had to pay the commissions, or "I could not have got the loan." (Sophie Fowler Rec., 67.) That Johnston was the company's agent in these matters is too plain for argument. *He was not a general loan broker* acting for *any* company that a borrower might designate or from whom he might have hoped to get the money. There has been a previous explicit understanding between this particular company and this man, that he was to act for it in negotiating loans. He recommended these loans in pursuance of a previous understanding to the effect, evidently, that he was to give the company the benefit of his judgment as to the advisability of such loans. It is not conceivable that the company would desire, upon such a point, the judgment of the borrower's agent. But the decisive point is, that it was distinctly contemplated between the company and Johnston in advance, that he was to act for it in obtaining loans, and yet that he was to receive no compensation whatever from the company. In the absence of evidence to the contrary, it must be necessarily presumed that the company contemplated and intended that Johnston should be paid, and that he should be paid by the borrower. *Vahlberg* v. *Keaton*, 51 Ark., 545; *Thompson* v. *Ingram*, *id.*, 546. The company received the benefits of such an

arrangement. The fact that the company's executive officers at New York may not have been informed of the exact amount which Johnston demanded for commissions in any particular case, it being to the company a matter of indifference, can not surely relieve the company of the consequences of recognizing and ratifying Johnston's act in making loans. The company must have known that he was to receive some commission from the borrower, and insomuch as in two of these cases, at least, the company itself was receiving the highest possible legal rate of interest, it must be presumed to have known that the borrower was paying in excess of that rate, since anything whatever paid by way of commissions would have made the loan cost the borrower more than the highest legal rate.

Payne v. *Newcomb*, 100 Ill., 620, 621.
Hoyt v. *Pawtucket Institution*, 110 Ill., 394.

It will be noted that in *Payne* v. *Newcomb* it does appear that the lender had attempted to fix the amount which his agent should charge for commissions, or to control in any way the arrangements which such agent might make for his fees. It would seem in this matter that, if between the company and Johnston the subject of the alleged commissions had been discussed at all, and that it was in contemplation of the parties, that the commission should come out of the borrower, then upon general principles of equity applicable to dealing between principal and agent, and between the agent and third persons, the company here claiming to recover on a contract made by Johnston, and with every reason to believe that an exaction of some commission was a part of the negotiations, should take the contract subject to such defenses as Johnston's conduct in relation to the contract makes available

to the defendants here. The company, adopting the contract, must adopt it as a whole, and cannot be permitted to accept so much of it as it may think beneficial and reject the remainder. Johnston was selected by this company for the purpose of loaning its funds. Had it chosen to do so, it could have required from him some security against the exaction of any commission which would involve it in the charge of usury. Having such power and not having imposed any such restrictions, it must take the consequences. In plain words, it has accepted the services of Johnston in making these loans, and all the benefits thereof, and has knowingly allowed the borrower to pay for such services. Has not such pay then gone into the company's pocket? Assuredly so.

Avery v. *Creigh*, 29 N. W. Rep., 154.
Bowers v. *Trepz*, 2 Atl. Rep., 372.
Austin v. *Harrington*, 28 Vt., 130.

The court below should have deducted from the principal sum actually received by the defendant all amounts which they paid on account of interest.

It must be remembered throughout in this case that *we are defendants, not complainants.* We are not asking the intervention of this court; we do not apply to the chancery for affirmative relief against a usurious bargain. We are dragged into court by our opponents. Therefore, since we do not invoke his aid, the counselor may not rightfully apply the maxim that "he who asks equity "must do equity." The court below had no right to impose upon us the condition of paying lawful interest or any other interest, if it be found that usury existed.

Fanning v. *Dunham*, 5 Johns. Ch., 141.

Snyder v. *Griswold*, 37 Ill., 223.
Clark v. *Finlon*, 90 Ill., 248.
Kuhner v. *Butler*, 11 Ia., 420.
Union Bank v. *Bell*, 14 O. St., 213.
Mitchell v. *Layman*, 77 Ill., 530.

The court below ought, under the statutes of Illinois, to have deducted all interest payments from the principal sum.

Mitchell v. *Layman*, 77 Ill., 530.
Driscoll v. *Tannock*, 76 Ill., 156.
Leonard v. *Patton*, 106 Ill., 103.
Reinbach v. *Crabtree*, 77 Ill., 182.
Maher v. *Lanfrom*, 86 Ill., 513.
Peddicord v. *Connard*, 85 Ill., 102.
Harris v. *Bressler*, 119 Ill.

These defendants do not agree to pay any rate per cent. save that expressed in the contract. If that rate, in effect, is higher than the law allows, the agreement cannot be enforced as it was made, and upon the application of the lender the court will not substitute for it an agreement which the parties did not make. The act of 1857, which was in force at the inception of the E. S. Fowler and the R. H. Fowler loans, provides:

"If any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to said person or corporation."

1 Gross Statutes (1869), Tit. Interest, Sec. 11, pp. 371–2.

The parties to an usurious bargain are not looked upon in equity as standing *in pari delicto*. While the contract

is executory, equity will not aid the creditor in enforcing it. The borrower in such case may set up usury as a defense without offering to pay the amount actually borrowed or legal interest thereon.

2 Pomeroy's Eq. Jur., sec. 937.

The interest at 10 per cent. on the bonds after maturity should not be allowed.

This increased interest was imposed *as a penalty* for default. This is a court of equity which will never lend its aid affirmatively to enforce a penalty. Ample compensation easily and with certainty ascertainable can be awarded to this complainant without the infliction of penalty upon defendants. The demand is simply a money demand. The measure of damages for the use of money is easily and at once ascertained by reference to the rate established by the law as the standard or legal rate. That this company did and does regard this increased rate as purely penal in its nature is evidenced from the record.

Mr. Elliott's correspondence given on pages 45–49, 50 and 53 of the record in the Sophie Fowler case, constantly speaks of this increased rate as being a "penalty." For instance, on page 45, Mr. Elliott in his deposition says: "It was understood that, if default was made in "the payment of such semi-annual interest, the defendant "should pay the same *penalty* as was provided in the "interest coupons given for interest before maturity, "namely, *ten per cent. thereon.*"

Again, in his letter of August 15, 1881, "Exhibit 4," page 50, Mr. Elliott says: "All these loans by their "terms bear ten per cent. *penal interest* upon all de-"faults." Again, in "Exhibit 11," on page 53, in another

letter, Mr. Elliott says: "The interest on the loan to "Rose H. Fowler is in arrears, and the loan to yourself "is in arrears; two installments for November 1, 1878, "and May 1, 1889, with *penal interest.* * * * The "interest on the loan to E. S. and Sarah Fowler for "$10,000 is also in arrears, two installments, *with penal* "*interest* thereafter."

Is it not a little remarkable that the court below while insisting that a forfeiture of interest should not be insisted upon in favor of defendants, should yet inflict upon the latter a penalty? In the Sophie Fowler case, it must be remembered that the contract rate was but nine per cent., and yet the court below imposed upon the defendants a ten per cent. rate because that was mentioned in the contract as the penalty for default.

"The distinction thus drawn between a penalty for securing the performance of the contract, and a stipulation which makes part of the contract itself, may be illustrated by the rule that if a certain rate of interest be reserved on a mortgage, with an agreement that, if it be not paid punctually, the rate shall be increased, the larger interest in the nature of a penalty, and may be relieved against in equity. But on the other hand, if the larger rate be originally reserved, with an agreement for reduction on punctual payment, the condition for such punctual payment is part of the contract, and relief cannot be given if it is not fulfilled."

Adams Equity (7th ed.) *108–9.

See,

Daily v. *Maitland*, 7 Norris (Pa.), 384.
Mosely v. *Taylor*, Gilm., 172.
Nichols v. *Maynard*, 3 Atkins, 519.
Thompson v. *Hudson*, L. R. 4, H. L. Cas., 1.

III.

THE COMPLAINANT WAS NOT ENTITLED TO A REHEARING.

The final decree was entered on October 24, 1884, being at the June term. The order granting a rehearing was entered June 30, 1885. A whole term, the January term of 1885, intervened. To the order allowing a rehearing the defendants duly excepted at the time. When this motion for rehearing was first made, nothing whatever appears to have been done by the court looking towards a continuance of the matter over to a succeeding term; nothing looking towards a retention by the court of jurisdiction of the case for the purpose of disposing of said motion. The motion or petition was simply filed without even the formality of leave of court, and, so far as appeared, without notice to defendants' counsel. We submit that the decree of October 24, 1884, had passed beyond the court's power to alter. The term at which it was entered having expired.

Sibbald v. *U. S.*, 12 Pet., 49.
Cameron v. *McRoberts*, 3 Wheat., 591.
The Avery, 2 Gall., 386.

The 88th Rule in Equity provides as follows:

"No rehearing shall be granted after the term at which the final decree shall have been entered and recorded, if an appeal lies to the Supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."

In every one of these cases an appeal lies, and has been allowed. The language of this rule is peremptory, —after the term "*no* re-hearing *shall* be granted," no matter when the application therefor may have been

made—for the very obvious reason that there is a plain remedy by appeal to a higher court. The rule cannot mean merely that no petition shall be heard unless filed before the term expires. Had such been the meaning it would have been easy to have expressed that meaning. Where an appeal lies, there is great propriety in exacting of the defeated party promptitude in such matters. Whence did the court below derive its power to enter at the June term, 1885, a *nunc pro tunc* order, as of the June term, 1884? It is not pretended that at the June term, 1884, a rehearing was actually granted, but omitted to be noted on record. This *nunc pro tunc* order does not pretend to represent what was actually done by the court at the preceding term. It avowedly attempts merely to supply an omission, not of the clerk, but of the court itself. If at the June term of 1884 either of the judges below had, as a matter of fact, ordered a rehearing, and the clerk had for some reason failed or omitted to record such order, then the omission might have been rectified by a *nunc pro tunc* order subsequently entered. But even in such case it ought to appear on record, by recital or otherwise, that, as a matter of fact, the judicial mind had, at the preceding term, been directed to the subject and had taken action, and that the omission sought to be rectified was merely the omission of the court's minister, the clerk, and not an omission of the court itself.

Respectfully submitted.

ROBERT G. INGERSOLL,
WILLIAM RITCHIE,
Counsel for
E. S. Fowler,
R. H. Fowler and
Sophie Fowler.

Supreme Court of the United States

OCTOBER TERM, 1896

No. 233.

EDWIN S. FOWLER AND SOPHIE FOWLER, Appellants,

v.

EQUITABLE TRUST COMPANY.

No. 321.

EQUITABLE TRUST COMPANY, Appellant,

v.

EDWIN S. FOWLER, et al.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT.

WILLIAM L. GROSS,
Solicitor for Equitable Trust Co.

CHICAGO, ILL.:
R. R. DONNELLEY & SONS COMPANY, PRINTERS.
1897.

Supreme Court of the United States,

OCTOBER TERM, 1890

No. 320.

EDWIN S. FOWLER AND SOPHIE FOWLER, *Appellants*,

v.

EQUITABLE TRUST COMPANY.

No. 321.

EQUITABLE TRUST COMPANY, *Appellant*,

v.

EDWIN S. FOWLER, et al.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT.

WILLIAM L. GROSS,

Solicitor for Equitable Trust Co.

STATEMENT.

On September 27, 1873, Edwin S. Fowler, residing at Springfield, Illinois, made written application to the Equitable Trust Company, addressed to it at its New York office, for the loan of $10,000 for 5 years, at 9 per cent. interest per annum payable semi-annually, and offering as security certain improved business property in Springfield, valued by him at $20,000. *Trans. of Rec. pp. 38, 39.*

R. P. Johnston, then a resident of Springfield, and "engaged in the real estate and loan business," had, prior to the date of Dr. Fowler's application, been furnished with the blanks used by the Trust Company in making loans, and instructed how to fill them out. He prepared Dr. Fowler's application, recommended the loan as applied for, and forwarded the application, with the usual abstract of title, to the Trust Company at New York, for its action thereon.

The terms proposed by Dr. Fowler, in his application, were not acceptable to the Trust Company, but after being so far notified as to provide for a loan of $9,000, at 10 per cent. semi-annual interest, was accepted by the Trust Company. The trust deed and bonds were then prepared for execution, and, with the Abstract of Title furnished by Dr. Fowler, were forwarded to the Trust Company at New York for its examination and approval. Having been approved, they were returned for execution. The Trust Deed and 9 $1,000 interest coupon bonds were dated November 1, 1873, but their formal execution and delivery did not take place until February 23, 1874.

It appears from the deed, that it was given to secure "9 certain coupon mortgage bonds" of even date therewith, by which the obligor, Edwin S. Fowler, bound himself to pay to the Trust Company the principal sum of $9,000, 5 years thereafter, with interest thereon at the rate of 7 per cent. per annum, payable semi-annually, on May and November 1st of each year, till the principal sum should be fully paid—both principal and interest being payable at the office of the Trust Company in the city of New York—the installments of interest for the five years being evidenced by 90 interest coupons of $35 each. Although by the terms of the Trust Deed the loan was to mature five years *after the date thereof*, the bonds, though of even date with the deed, did not by *their* terms mature until five years after May 1, 1874, namely, May 1, 1879; nor was there attached to the bonds any interest coupons for the first six months after the *date of the deed*, namely, from November 1, 1873, to May 1, 1874. *Trans. of Rec. p.* 35. And it is in the deed recited, that "said bonds for $9,000, were given to secure a loan of that amount, payable 5 years after date thereof, with interest at 10 per cent. per annum, * * of which said interest 7 per

cent. per annum is secured by this deed of trust and is to be paid as in said bonds provided, and the balance, to-wit, 3 per cent. per annum has been discounted, and the same, less the discount thereon, paid at the time of the execution of these presents." *Trans. of Rec. p. 18.*

It was stipulated in the bonds that the same should, after maturity, draw interest at ten per cent per annum.

In case of default, the trustee was authorized to sell the mortgaged premises, and out of the proceeds to pay the costs and charges of the trust, "including commissions such as are at the time * allowed by the laws of Illinois to sheriffs on sale of real estate on execution, etc."; insurance premiums paid, or taxes or redemption from tax sales paid, with 10 per cent. interest thereon, and the unpaid mortgage debt and interest. *Trans. of Rec. p 20.*

On the same day, February 23, 1874, Johnston wrote to the President of the Trust Company that he had forwarded by express the 9 bonds of Dr. Fowler, and that he should, the next day, draw on him in favor of Dr. Fowler, "as per following account:"

"Par value of bonds		$9,000.00
"Less discount from May 1, 1874, to May 1, 1879	1,042.20	
		$7,957.80
"Interest from Feb. 23, 1874, to May 1, 1874, "67 days, at 10%	148.11	
"Amount of draft		$7,809.69

The approval of Richmond Wolcott of the title of this security was enclosed with application.

Accordingly, on the *same* day, Feb. 23, 1874, Johnston drew a draft on the Trust Company at New York, in favor of Dr. Fowler, for the sum shown by that account, $7,809.69, which Dr. Fowler accepted, indorsed and collected in full. *Trans. of Rec. pp. 37, 38.*

It is apparent, from the course of the business of the Trust Company, that May 1st and November 1st were periods adopted from and to which its loans should run, and upon which its semi-annual interest payments should mature; and as the money was actually paid 67 days before the 5 year's period named in the bonds began to run, the deduction of interest for that

number of days was made, in ascertaining the present worth of the loan.

Johnston had an understanding with the Trust Company before this loan was made, by which the Trust Company furnished him the blank applications, and the blank for reporting any loan proposed (same as in this case "Ex. F and D") and instructed him how to fill such blanks; but the company did not undertake to pay him anything in respect of any loan applied for through him—in that matter leaving him to collect his brokerage from the borrower. *Trans. of Rec. p. 37.*

Before Dr. Fowler made application for this loan through Johnston, he agreed that on the completion of the loan he would pay Johnston a commission of $100. After the loan was completed, and after the delivery to Dr. Fowler of the draft for the present worth of the loan, he paid Johnston this $100. *Trans. of Rec. p. 36.*

Dr. Fowler, in his testimony, says, that the sum received by him on this loan was $7,944.59, "that is, after taking out Johnston's commission." *Trans. of Rec. p. 39.*

This conflict between the statements of this witness, as to the sum received by him, and the documentary evidence produced by Johnston, is probably owing to the fact, that Dr. Fowler's examination preceded that of Johnston, and Fowler did not have before him the statement of the loan and the draft therefore collected by him, that were produced by Johnston on the latter's examination.

Dr. Fowler was not recalled to dispute the statements of Johnston, or to deny that he received and indorsed the draft, and collected of the Trust Company the full amount thereof.

Johnston further testified, "that the draft for $7,809.69 exhibited herein, was for the full value of this $9,000 loan on the day it was negotiated and closed, as before stated and shown, and no deduction from said full value of this loan on that day was made by me on account of my said commission or on any other account whatever. The agreement under which this commission was paid me by the defendant was unknown to the complainant, and no part of said $100 belonged to or was paid to the complainant." *Trans. of Rec. p. 36.*

Further: "In the negotiation of this loan from its inception to its completion I acted as the medium of communication be-

tween the complainant and defendant. I was not authorized, neither did I attempt, to accept or reject the defendant's application for this loan; nor did I pass on the question of title to the real estate—all these matters having been submitted to and decided by the complainant in New York; nor for what I did in connection with this loan was I paid by the complainant anything; nor was I authorized by the complainant to do anything in connection with this loan more than I did, and as I have shown." *Ibid.*

The report of the Master, to whom the cause was referred "for computation and report," shows (*Trans. of Rec., p. 32*) that no claim was made or allowed of interest accrued *before* maturity, but was made for the whole unpaid principal. It further shows an allowance by the Master of interest on the whole of the principal *after* maturity, at the contract rate of 10 per cent. per annum, and that certain payments on account of interest after maturity were admitted. It also shows an allowance for insurance paid, etc., and also for solicitor's fees, "as prayed, being same as sheriff's fees of circuit courts of Illinois."

And this report, to which no exception was taken, is thus summarized:

Principal of bonds	$9,000 00
Interest, 10 per cent., after due to April 2, 1883, 3 years, 11 months, 1 day	3,527 50
Insurance advanced and interest	38 47
Solicitor's fee	166 29
	$11,732 26
Credits admitted	1,679 02
Amount due April 2, 1883	$10,053 24

In the supplemental report of Master, dated Jan. 11, 1887, (*Trans. of Rec., p. 51*), the insurance item is increased by accrued interest, and a new item appears, money advanced for taxes, and interest thereon.

THE BILL AND ANSWERS.

THE BILL, *to foreclose:* Complainant, a Connecticut corporation; principal office, New London; branch office, city of New York; citizen of Connecticut. Defendant, citizen Southern District of Illinois; defendant indebted for borrowed money, on

nine $1,000 interest coupon bonds, maturing May 1, 1879, with interest *after* maturity, at 10 per cent. per annum; principal and interest payable in New York city; to secure which defendant conveyed in fee simple to Jonathan Edwards premises described. *In trust,* to secure the bonds and interest, subject to defeasance on payment, etc.; upon death, etc., of trustee, title to vest in successor trustees named; upon default, trustee to sell premises and apply proceeds, etc., including such a commission as by the laws of Illinois sheriffs are allowed on sale of real estate on execution, etc.; default as to principal, and interest after maturity, and to keep premises insured and taxes thereon paid; death of trustee, and refusal of successor trustees to act, resort to equity necessary; equitable proceedings necessary; complainant entitled, as part of expenses and in lieu of usual solicitor's fees, to same commission allowed sheriffs in Illinois on execution sales; default and mortgage premises forfeited, subject to redemption; sworn answer waived.

Prayer: for account of principal and interest after due, solicitor's fees, insurance and taxes paid, decree for full payment, sale of premises and process. *Trans. of Rec., pp. 2–17.*

ANSWERS.—*Original Answer.* About November 1, 1873, Johnston, doing business in Springfield for Trust Company, proposed loaning defendant $9,000 for 5 years at 7 per cent interest, which defendant accepted and executed and delivered the bonds and trust deed;* bonds usurious in this—while the bonds aggregate $9,000, defendant only received in consideration thereof, $7,972.74, the balance of the $9,000 being retained and claimed by Johnston as compensation for negotiating the loan, which was a device to conceal usury and avoid the statute: pleads statute of Illinois. Admits complainant is a Connecticut corporation; says by laws of Connecticut it is forbidden to loan money at greater rate than 7 per cent.; that in conducting its business with defendant it sought to evade the laws of its creation; that it was without power under Connecticut laws to transact the business with defendant; that it was not granted power to loan money at interest in any State other than Connecticut and could not loan money at interest in Illinois, wherefore bonds are void. Further, that years ago Equit-

* Amended answer to follow here.

able Life Assurance Co. was organized under New York laws, with office in the City of New York, to do life insurance business, and in such business accumulated profits and earnings; that said company had no power under its charter to loan money on real estate security; that corporators of said company went to Connecticut and organized complainant corporation, with office in the City of New York, with intent to loan said profits and earnings for interest contrary to and in evasion of laws of New York; that the bonds and trust deed were received by complainant to secure a loan of said profits and earnings furnished by Assurance Company—loan being for benefit of latter company, which had no power to make the loan and receive such security.

Denies complainant's right to relief, etc. *Trans. of Rec. 28-30.*

Amended Answer: At date of bonds, complainant was loaning money in Springfield, through the agency of Johnston; defendant applied to said agency to borrow $9,000 for 5 years at 10 per cent. interest per annum, which was accepted; upon making bonds and trust deed, it was corruptly agreed that the bonds should be for $9,000 at 7 per cent. interest per annum, and the difference between 7 and 10 per cent. should be deducted in advance from the $9,000 for the 5 years and defendant should pay Johnston $128.15 as his commission; accordingly bonds were executed for $9,000 at 7 per cent. interest and defendant received "*only so much of said sum of $9,000 as was left after deducting therefrom said difference between 10 and 7 per cent. per annum for 5 years and by paying said sum of $128.15 to said Johnston.*"

Further, the contract for the loan of said money is a New York contract, and by the laws of that State is usurious and pleads the statute of New York. *Trans. of Rec. pp. 33, 34.*

POINTS OF DEFENSE: AS PLEADED.

1. USURY. (*a*) *Original Answer:* Contract of loaning $9,000 for 5 years at 7 per cent.—only received thereon, $7,972.74, balance, $1,027.26, retained by agent of complainant.

(*b*) *Amended Answer:* Contract of loaning $9,000 for five years at 10 per cent.—7 per cent. reserved in bonds, 3 per cent. for 5 years and agent's commission of $128.15 deducted

in advance, and defendant only received $7,521.85; (*c*) New York contract, violative of laws of that State.

2. ULTRA VIRES. *Original Answer:* (*a*) Connecticut corporation, without power to loan money in Illinois for more than 7 per cent., or to loan in Illinois at all; (*b*) funds loaned the property of Life Assurance Co., loaning by complainant a shift to evade laws of New York.

COMPARISON.

AS TO CONTRACT AND AMOUNTS.

Facts Pleaded.	*Facts Shown in Evidence.*
Original Answer.	
Loan applied for, $9,000, 5 years at 7 per cent. interest.	Loan applied for, $10,000., 5 years at 9 per cent. interest.
Loan accepted, $9,000, 5 years at 7 per cent. interest.	Loan accepted, $9,000., 5 years at 10 per cent. interest—7 per cent. reserved in bonds, 3 per cent. for 5 years discounted in advance.
Loan effected, for 5 years at 7 per cent. interest ..... $9,000 00 Deducted in advance, as agent's commission 1,027 26	Loan effected, for 5 years, 67 days, at 10 per cent. interest ..... $9,000 00 7 per cent. reserved in bonds. $2^{316}/_{1000}$ per cent. 5 years discounted ..... $1,042 20 Deducted, 10 per cent. for 67 days 148 11 1,190 31
Received by defendant only $7,972 74	Paid to defendant by draft $7,809 69
Johnston, complainant's agent.	Johnston, real estate and loan broker.
Amended Answer.	Broker's commissions deducted. (Nothing.)
Loan applied for, $9,000, 5 years a 10 per cent. interest.	Loan applied for, $10,000., 5 years at 9 per cent. interest.
Loan accepted, $9,000, 5 years at 10 per cent. interest.	Loan accepted, $9,000., 5 years at 10 per cent. interest—7 per cent. reserved in bonds, 3 per cent. for 5 years discounted in advance.
Loan effected, for 5 years at 10 per cent. interest ..... $9,000 00 Deducted in advance, 3 per cent, for 5 years and $128.15, agent's commissions 1,478 15	Loan effected, for 5 years, 67 days, at 10 per cent. interest ..... $9,000 00 7 per cent. reserved in bonds. $2^{316}/_{1000}$ per cent. 5 years discounted ..... $1,042 20 Deducted 10 per cent. for 67 days 148 11 1,190 31
Received by defendant only $7,521 85	Paid defendant by draft $7,809 69
Johnston, complainant's agent.	Johnston, real estate and loan broker.
	Broker's commission deducted. (Nothing).

Statutes Pleaded.	*Statutes Introduced in Evidence.*
Statutes of Illinois respecting interest and usury.	Taken notice of judicially.
Statutes of Connecticut respecting interest and usury	(Nothing).
Statutes of New York respecting interest and usury.	(Nothing).

ULTRA VIRES.

Facts Pleaded.	*Facts Shown in Evidence.*
Interest laws of Connecticut.	(Nothing).
Funds loaned, property Life Assurance Co., loaning a shift to evade law of New York.	(Nothing).

ACTION OF THE COURT ON HEARING.

"*The Fowler Cases:*

"Conclusions of the Court:

"1. The complainant, a Connecticut corporation, by its charter, is authorized to loan money at a rate of interest of 7 per cent, and is prohibited by the law of that State from receiving a greater rate of interest, under the penalty of forfeiting the interest received.

"2. The law of Illinois authorized foreign corporations to transact business in this State, but this permissive legislation must be construed as restricting them to the exercise of the powers conferred by their charter, and not as enlarging their capacity.

"3. The complainant had, therefore, no capacity to make loans of money in Illinois, at a rate of interest exceeding 7 per cent.

"4. The loans in question were 10 per cent loans and beyond the capacity of the corporation to make by its charter.

"5. The complainant is entitled to a decree of foreclosure for the amounts actually advanced to the defendants and costs, but without interest. The decree to bear interest from its rendition.

"6. The payments made by the defendants to Johnston for commissions, are not to be deducted from the amounts advanced by complainant; and any amounts paid by the complainant for taxes on the property mortgaged, to be added to the sums advanced, and interest thereon.

"7. The three cases to be consolidated, and the decree to embrace the subject matter of all of them, with the right of the complainant to an appeal, on a nominal bond in the consolidated case.

S. H. T.

"Decree to be entered as of the 20th October, 1884."

DECREE OF OCTOBER 20, 1884.

Because of non-payment of the balance of the principal sum actually received by the defendant, secured by the mortgage and bonds now due, to-wit, $2,980.67, and insurance and taxes paid, and interest thereon, $270.94, there is now due complainant $3,251.61 and costs.

Orders payment, and on default, sale of premises, etc. *Trans. of Rec. pp. 46–48.*

MOTION AND PETITION FOR REHEARING. BEFORE FULL BENCH.

Filed October 20, 1884. *Trans. of Rec. p. 49.*

ORDER OF ALLOWANCE, *Nunc Pro Tunc. Trans. of Rec. pp. 50, 51.*

ACTION OF COURT ON FINAL HEARING.

"CHICAGO, January 11, 1887.

"*Hon. S. H. Treat, Springfield, Ill.:*

"DEAR JUDGE: I have looked into the cases of the Equitable Trust Company vs. Rose H. Fowler, Same vs. Edwin S. Fowler, and Same vs. Sophie Fowler. While I do not think the defense of usury is sustained in the latter case, namely, the suit against Sophie Fowler, I think the evidence does show that the complainant exacted and received usury in the other two cases. Johnston represented the complainant at Springfield. He was furnished with blank applications, notes, bonds and mortgages, and received instructions how he was to act as the complainant's agent. He was none the less the complainant's agent because of the agreement between him and the complainant by which he was to obtain compensation for his services from borrowers, and charge the complainant nothing for such services. His arrangement with the complainant was, in effect, that he was to do certain things for it, for which he was to be compensated by borrowers, or not at all. It is idle, therefore, to say that in effecting these loans Johnston acted as the agent of the defendants. As the complainant's agent or representative, he sent papers and information to it, with his recommendations for its action. His suggestions and opinions had weight with the complainant, because he was its agent.

"On the assumption, however, that the commissions were matters wholly between the defendants and Johnston, and not proper charges against the complainant, yet, it exacted and received more than 10 per cent. upon the amount actually paid over to Edwin S. and Rose H. Fowler. If the complainant was authorized to retain or discount part of the interest in advance, it was authorized to discount or retain the entire interest in advance, which would lead to a result so palpably unjust that no court could be expected to sustain it. It does not follow that because interest may be thus reserved, or discounted, on short loans, that it can be so reserved on loans for five or ten years.

"I think the complainant is entitled to a foreclosure of the Sophie Fowler mortgage for the amount of principal and interest, and a foreclosure of the other two mortgages for the amounts actually advanced to the defendants, with interest from the date of the decree; not, however, treating the interest paid as credits upon the principal. Will you please have decrees entered in these cases in accordance with the views herein expressed? Perhaps the counsel can make the computations without any reference.

"I go to Madison this evening where I shall be detained ten days or two weeks.

"Yours truly,

[Signed]. "W. Q. Gresham."

SUPPLEMENTAL REPORT OF MASTER.

January 11, 1887.

Sum actually advanced to defendant		$7,809 69
Paid for insurance and interest thereon	$52 87	
Paid for taxes and interest thereon	288 23	
		341 10
Total amount due		$8,150 79

Trans. of Rec p. 51.

Final Decree of January 11, 1887.

Because of non-payment of sum actually advanced by complainant and secured by the trust deed and bonds, to wit, $7,809.69, and $341.10 insurance and taxes paid and interest

thereon, there is due to complainant and unpaid $8,150.79. Payment ordered, and on default sale of premises, etc.

Appeal by both defendant and complainant prayed and allowed. *Trans. Rec. pp. 52-54.*

DECREES COMPARED.

Decree of October 20, 1884.		*Decree of January 11, 1887.*	
Sum actually advanced	$7,809 69	Sum actually advanced	$7,809 69
Int. paid to maturity $3,150 00		Ins. and taxes and interest.....	341 10
Int. paid after maturity... 1,679 02		Amount found and decreed	$8,150 79
	4,829 02		
Balance of principal actually received by defendant.....	$2,980 67		
Ins. and taxes and interest.....	270 94		
Amount found and decreed.....	$3,251 61		

CHARTER OF EQUITABLE TRUST COMPANY.

(Trans. of Rec., in Case of Sophie Fowler v. Equitable Trust Co., being No. 324, pp. 57—61).

Act of June 19, 1839, General Assembly of Connecticut, incorporating the *Ocean Trust Company*—Name changed to *Equitable Trust Company*.[1]

"§ 1. * * And by that name shall be capable in law to purchase and hold all kinds of property, real, personal, and mixed, and the same at pleasure to lease, hold and convey; to sue and be sued, plead and be impleaded, in all courts; to have and use a common seal, and the same to alter at pleasure; to make and carry into effect all such by-laws and regulations as may be deemed expedient for the proper management of the affairs of the corporation not repugnant to the charter, the laws of this State or the United States, and generally to do and cause to be done and executed all such acts and things as may seem necessary and proper within the limitations aforesaid:[2] Provided, that the office and place of business of said company shall be in the city of New London, etc.

"§ 2. The corporation hereby created shall also have power to receive money in trust and on deposit, and to allow and pay interest on said money, *and to loan the same at any rate of interest allowed by law;* may take and receive on deposit or in custody for safe keeping, bonds, plate, jewelry, stocks, and other valuable property, upon such terms and for such compensation

[1] By act of June 22, 1871. *Trans. of Rec., Case No. 324, p. 60.*

[2] *Proviso* added by act July 6, 1879. *Ibid. p. 60.*

as may be agreed upon, etc. (Remaining portion of § 2 and all of § 3, repealed).

"§ 4. It shall be lawful for the corporation hereby created to take and hold any real or personal estate, in trust or otherwise, as security for and in payment of loans and debts due or to become due to the said company, to purchase real estate or any other property at any sale made in virtue of any loan, debt, or mortgage made or held by said company, and to receive or take in satisfaction of any such loan or debt any real estate or other property, and to hold and convey the same at pleasure.

* * * * * * * * * * *

ACT *amending Charter of Equitable Trust Company.*

(May Session, 1872).

§ 1. (Authorizing increase of capital stock).

"§ 2. That said company is hereby authorized to elect ten trustees in addition to the number and in the manner now provided by law, and may have such offices and agencies in other States as may be necessary for the transaction of its legitimate business: *Provided*, That the office, books and records of said company shall be kept at New London, in this State, and be at all times open and subject to the inspection of the bank commissioners.

"§ 3. Said company may take such securities for loans as are now authorized by its charter, in such form, and may sell and dispose of the same in such manner as it may determine, and may guarantee the payment of the principal and interest of such securities. * * *"

ILLINOIS INTEREST STATUTES.

IN FORCE WHEN LOAN WAS MADE.

[*Ch. 74, R. S., 1874. "Interest." Took effect July 1, 1874.*]

1. Act 30 January, 1849, Section 1: Gross' Stats., 1869, 370, Section 4. "Money may be loaned at such rate of interest, not exceeding 10 per cent. per annum on each $100, as the parties may agree upon."

2. Act 12 Feb., 1857: Gross' Stats. 1869, 371 Sec. 13. "Where any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful ac-

cording to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or Territory of the United States, or in the city of London, England; and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable."

3. Act 16 Feb. 1857: Gross' Stats. 1869, 372 Secs. 14, 15 and 16. § 14. "It shall be lawful for any person or corporation borrowing money in this State, to make notes, bonds, bills, drafts, acceptances, mortgages, or other securities, for the payment of principal or interest at the rates authorized by the laws of this State, payable at any place where the parties may agree, although the legal rate of interest in such place may be less than in this State; and such notes, bonds, * * shall not be regarded or held to be usurious; nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the State, Kingdom or Country where the paper is made payable, being less than in this State, nor of any usury or penal laws therein."

§ 15. "No plea of usury nor defense founded upon an allegation of usury shall be sustained in any court in this State, nor shall any security be held invalid on an allegation of usury where the rate of interest reserved, discounted or taken does not exceed that allowed by the laws of this State, in consequence of such security being payable in a State, Kingdom or Country where such rate of interest is not allowed."

§ 16. "It shall be lawful for all parties loaning money in this State, to take, reserve or discount interest upon any note, bond, bill, draft, acceptance or other commercial paper, mortgage, or other security, at any rate authorized by the law of this State, whether such paper or security for principal or interest be payable in this State, or in any other State, Kingdom or Country, without regard to the laws of any other State, Kingdom or Country; and all such notes, bonds, bills, drafts, acceptances, or other commercial paper, mortgages or other security, shall be held valid in this State, whether the parties to the same reside in this State or elsewhere."

"§ 26. Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. * * " R. S. 1874, Ch. 32, "Corporations," p. 390 § 26.

This section, "by the most direct implication, authorized foreign corporations to acquire real estate in satisfaction of any liability or indebtedness to them."

Columbus Buggy Co. v. *Graves*, 108 Ill., 459.

"That any corporation formed under the laws of any other State or country, and authorized by its charter to invest or loan money, may invest or loan money in this State. And any such corporation that may have invested or lent money as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title whenever a natural person might do so in like case. * * " Act April 9, 1875. Starr & Curtis' Stats., p. 628.

This act "was not restrictive but an enabling act, and it did not take away from foreign corporations the power to acquire real estate which was given to them by the General Corporation Act" of 1872.

Columbus Buggy Co. v. *Graves*, 108 Ill., 459.

The loaning of money in Illinois by a foreign corporation, and securing the same upon real estate, is not prohibited by any legislation of the State, and is not contrary to public policy.

Stevens v. *Pratt*, 101 Ill., 206, overruling *Mortgage Co.* v. *Gross*, 93 Ill., 483.

Commercial Union Assurance Co. v. *Scammon*, 102 Ill., 46.

Brown v. *Mortgage Co.*, 110 Ill., top of p. 242.

STATUTES OF ILLINOIS.

COMMISSION ALLOWED SHERIFFS, ON EXECUTION SALES.

In Force when Mortgage was Made.

"* * There shall be allowed to the several sheriffs in this State a commission of 3 per centum on all sales of real and personal estate which shall be made by virtue of any execution, or any decree of a court of chancery, when the money arising from such sales shall not exceed $200; but in all cases where the amount of such sale shall exceed that sum, then 1½ per cent commission on the excess only shall be allowed." R. S. 1874, p. 511, last ¶ of § 19.

ERRORS ASSIGNED.

1. The Court erred in denying the Trust Company relief for the full amount of the principal of the bonds, and the unpaid balance of the interest thereon, at the contract rate, from maturity to date of decree.

2. In denying the Trust Company relief, as to commissions for its solicitor, at the rate allowed sheriffs in Illinois on execution sales of real estate.

POINTS AND AUTHORITIES.

I.

CORPORATIONS, EXERCISE OF POWERS IN OTHER STATES.

As to Contracts.

A corporation dwells in the State under whose laws it is created, and such residence creates no insuperable objection to the exercise of its powers of contracting in another State.

The presumption, under the general comity among States, prevails that, unless forbidden by its charter, a corporation may exercise corporate powers in other States unless prohibited therefrom by the public policy of such other State.

Christian Union v. *Yount*, 101 U. S., 352.

Accordingly, in exercising corporate powers extra-territorially, it is for the local sovereignty to prescribe the terms and conditions upon which the presence of a foreign corporation for the conduct of its affairs may be permitted.

St. Louis v. *Ferry Co.*, 11 Wall., 423.

Carroll v. *E. St. Louis*, 67 Ill., 568.

The power to contract existing, it may be exercised by the corporation in the same way as a natural person may contract.

McKiernan v. *Lenzen*, 56 Calaf., 61.

II.

CONTRACTS BY CORPORATIONS IN VIOLATION OR EXCESS OF CHARTER POWERS.

Charter Power: *To Loan Money "At any Rate of Interest Allowed by Law."*

PLEA OF ULTRA VIRES.

In construing the charter of the United States Mortgage Company, organized under the laws of New York, wherein authority was given to lend money on bond and mortgage of real estate situated within the United States, and where the contention was, that the corporation was limited by the rate of interest fixed by the laws of New York, the holding was: "We concur with the Court below in holding this position to be untenable. Reasonably construed, the appellant's charter authorized it to con-

tract for such rate of interest as was lawful in the State where the contract of loan was made, and where the property mortgaged to secure the loan was situated. * * When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest exceeding the legal rate, it did not intend to withhold from it the power to contract in other States for interest upon moneys loaned upon terms less favorable than those States permitted in respect to loans there made by other corporations and by individuals."

United States Mortgage Co. v. *Sperry*, (Feb. 2, 1891) Sup. Court Rep., pp. 321, 328.

Under the doctrine of comity among States, persons or corporations may go into other States and there transact any lawful business, so long as by so doing they do not controvene the policy of such other States.

The policy of the State of Illinois, in respect to contracts between citizens of that State and citizens or corporations of other States, is shown by legislative enactment. See ante p. 114 [Chap. 74, "Interest," R. S. 1874, p. 615, § 8.].

"When any bond, bill, draft, acceptance, mortgage, or other contract, shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, Territory or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, Territory or country, such contracts shall be governed by the laws of this State." Re-enactment of act of Feb. 12, 1857, 1 Gross' Stats. 1869, p. 371, § 13.

Story on Conflict of Laws, 11 Ed., § 278.

The general rule is, that the plea of *ultra vires* shall not prevail when, instead of advancing justice, it would accomplish a wrong; and it makes no difference, in this respect, whether it is interposed for or against the corporation."

Darst v. *Gale*, 83 Ill., 140.

Alexander v. *Tolleston, Club* 110 Ill., p. 73.

As deducible from a consideration of all the authorities, the rule is thus stated: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an un-

authorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract," to enforce its provisions.

2 Morawitz Priv. Corpn., § 689, *et seq.*

Although, in making a contract, the corporation may act in disagreement with its charter; if the question is simply as to its capacity or authority to contract under its charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity.

Township of Pine Grove v. *Talcott*, 19 Wall. p. 678.
Sedgwick's Statutory and Constitutional Law, p. 90, and Cases cited.
Germantown, etc., Ins. Co. v. *Dhein*, 43 Wis. 420: 28 Amer. Rep., 549.
Steam Navigation Co. v. *Weed*, 17 Barb., 378.
2 Morawitz Priv. Corpn., § 695, and Cases cited, notes 1, 4. See also §§ 673 and 696*a*, and Cases there cited.
Bishop on Contracts, § 286, Enlarged Edition.
Mutual Life Ins. Co. v. *Wilcox*, 9 Biss., 203.
National Bank v. *Matthews*, 98 U. S., 621.
Gold Mining Co. v. *National Bank*, 96 U. S. 640.

If a corporation "contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract."

Littleworth v. *Davis*, 50 Miss., 403.
Haynes v. *Covington*, 13 S. and M. (Miss.), 411.
Pancoast v. *Travelers Ins. Co.*, 79 Ind., 172.
Commercial Bank v. *Nolan*, 7 How. (Miss.), 508.
Little v. *O'Brien*, 9 Mass., 423.

The execution of a mortgage to a corporation is an admission of the competency of the corporation to enforce its rights thereunder.

Biglow on Estoppel, p. 424, and Cases cited.

Even if the corporation contracted for a greater rate of interest than was provided in its charter, yet, if it did not violate the general usury laws governing the contract, it would not constitute usury.

Lyon v. *State Bank*, 1 Stew. (Ala.), 468.
Commercial Bank v. *Nolan*, 7 How. (Miss.), p. 529.

While, therefore, the taking of interest by a corporation beyond the rate authorized by the law governing it would be a violation of its charter, for which the State might apply a remedy, yet, if the law does not declare that such act shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery.

Fleckner v. *Bank*, 8 Wheat. p. 355.

The remedy rests with the State, by *quo warranto* to dissolve the corporation.

The Banks v. *Poitiaux*, 3 Randolph, p. 142.
Silver Lake Bank v. *North*, 4 Johns., Ch. 370.
Wade v. *Amer. Col. Soc.*, 7 S. & M. (Miss.), p. 697.
Alexander v. *Tolleston Club*, 110 Ill., 65.
Fleckner v. *Bank*, 8 Wheat., p. 355.
Barnes v. *Suddard*, 117 Ill., 237.
Mutual Life Ins. Co. v. *Wilcox*, 8 Biss., 263.
National Bank v. *Whitney*, 103 U. S., 99.

III.

THE LAW OF THE CONTRACT.

Bonds executed by Residents of and Secured upon Lands Lying in Illinois, but payable in New York, Interpreted and Controlled by the Law of Illinois.

In its simplest form the rules is, "when there are two conflicting laws, that will be accepted which will best sustain an obligation."

Wharton's Evidence § 314.

And no better exposition of this doctrine can be found than that given by Mr. Justice Swayne in *Miller* v. *Tiffany*, 1 Wall., page 310: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usuary." *Andrews* v. *Pond*, 13 Peters 77, 78; *Curtis* v. *Leavitt*, 15 N. Y. 92; *Berrien* v. *Wright*, 26 Barbour 213.

"The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at

the place of performance, the parties may lawfully contract in that case also for the higher rate." *Depeau* v. *Humphrey*, 20; Howard [8 Martin, La.] 1; *Chapman* v. *Robertson*, 6 Paige, 634.

"These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there it is so everywhere." *Andrews* v. *Pond*, 13 Peters 78; *Mix* v. *Madison Ins. Co.*, 11 Ind., 117; *Corcoran* v. *Powers*, 6 Ohio St. 19.

So, if a note payable in New York, be given in the State of Illinois for money lent there, reserving 10 per cent. interest, which is legal in that State, the note is valid, although but 7 per cent. interest is allowed by the laws of the former State.

Scudder v. *Union National Bank*, 91 U. S. 406.

In *Chapman* v. *Robertson*, the contract of loan was made in New York upon mortgage of lands in New York, valid in such State, and it was held that the contract could not be in violation of usury laws of England, although the money was made payable in the latter country where the rate of interest was less than in New York.

In *Pancost* v. *Trav. Ins Co.*, 79 Ind., p. 179, the notes and mortgage were made in Mississippi, secured upon lands in Indiana where the mortgagor lived, but payable in Connecticut. It is there said: "The mortgagor lives in this State—the lands lie in this State, and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this State. The mortgage could be enforced nowhere else. In such case the law of this State governs, the rate and interest being fixed in accordance with the laws of this State."

See also *Townsend* v. *Riley*, 46 N. H., 300.

Peck v. *Mayo*, 14 Vt., 33.

Arnold v. *Potter*, 22 Iowa, 194.

Under a similar state of facts, in *Fisher* v. *Otis*, 3 Chand. ("Wis.) 83; S. C., 3 Pinn. (Wis.) 78, it is said: "The *lex loci contractus* controls the construction and validity of the contract. A contract valid where it is made is valid everywhere except it is shown that the contracting parties intended to be governed by the laws of the country where performance was to be made."

And see *Newman* v. *Kershaw*, 10 Wis., 333–340.

Although it may be regarded as settled that where a contract is made in one country to be performed in another, the *presumption* is that the parties contracted with reference to the laws of the latter, yet, says the Court, in *Brown* v. *Freeland* 34, Miss., 181: "The presumption is never to be indulged that the parties intended, in making their contract, to violate the law; and if there be two laws with reference to which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended, because they had their election to mould their contract according to either law; and as the law presumes in favor of a contract and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract."

A Pennsylvania banking corporation agreed in that State, with a citizen of New York, to renew his note held by the bank. A renewal note was made, dated, and payable in New York, and mailed to the bank with a check for the amount of the discount—the rate of discount being according to the law of Pennsylvania, but unlawful in New York. *Held*, not usurious in New York.

Wayne County Savings Bank v. *Low*, 81 N. Y., 566; 37 Amer. Rep. 533.

Thompson v. *Edwards*, 85 Ind., 414, was where a resident of that State applied to a resident of New York for a loan. Notes and a mortgage on lands in Indiana were executed in Indiana, and the money paid to the borrower in Indiana,—some of the notes being payable in New York, and others specifying no place of payment. In a proceeding to foreclose it was contended that the contracts were New York contracts, and as they stipulated for a higher rate than the New York rate, they were for that reason usurious. *Held*, that the plain inference from the evidence was that the bonds and mortgage were executed in Indiana and with reference to the laws of that State, and consequently the usury laws of New York had no application, as a defense. Citing: Wharton Conflict of Laws, secs. 508–510; *Arnold* v. *Potter*, 22 Iowa 194; *Chapman* v. *Robertson*, 6 Paige 627; *Pine* v. *Smith*, 11 Gray 38; *Bank* v. *Lewis*, 45 Barb. 340; *Levy* v. *Levy*, 78 Pa. St. 507 (21 Am. Rep.

35); *Fitch* v. *Remer*, 1 Biss. 337; *Phila. Loan Co.* v. *Towner*, 13 Conn. 249. Rorer on Inter-state Law, page 48.

And in *Cromwell* v. *County of Sac*, 96 U. S., p. 62, it is said: "Where the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern." Cases cited.

Followed in *Dugan* v. *Lewis*, Sup. Court of Texas, 14 S. W. Rep., 1024.

IV.

Of the Defense of Usury.

1. *Usury, a Local Question.*

It is the *lex loci contractus* which governs in respect of usury.

De Wolf v. *Johnson*, 10 Wheaton, 383.

Andrews v. *Pond*, 13 Peters 78.

"The question (respecting interest) is one of local law under a statute of a State, and the construction given by its tribunals should conclude us."

Cromwell v. *County of Sac*, 96 U. S. p. 62.

The note, the basis of the suit, which is said to be usurious, having been made in Iowa, the contract must be governed by the laws of Iowa.

Call v. *Palmer*, 116, U. S. 98.

And whether a contract is usurious or not, must be determined by the law in force at the time of its execution.

Latrobe v. *Hulbert*, (U. S. Circuit Court, S. D. of Ohio, Swing, D. J.), 6 Fed. Rep. 209.

2. *Allegata et Probata.*

The rule is general, and without exception, that an averment or plea of usury, must be proved as laid.

Ewing v. *Howard*, 6 Wall. 499, citing *Marvin* v. *Feeter*, 8 Wend. 533.

Holden v. *Pollard*, 4 Peck 173.

Drake v. *Watson*, 4 Day 37.

Wilmot v. *Monson*, *Ibid.* 114.

Brown v. *Mortgage Co.*, 110 Ill. 235.

Kihlholz v. *Wolf*, 103 Ill. 362.

Phillips v. *Roberts*, 90 Ill. 492.

Telford v. *Garrels*, 132 Ill. 550.

When usury is pleaded in an answer in chancery, and the facts and circumstances constituting it specially set forth, evidence proving a usurious contract different from that alleged in the answer, is inadmissible and insufficient.

Bach v. *Fulton Bank*, 3 Wend., 573.

Any variance between the averments of the plea and the proof, as to the *sum* alleged to be usurious, is fatal.

Smith v. *Brush*, 8 Johns., 84.

And if the defendant fails in proving the usurious contract in the way and manner in which he has charged it in his plea or answer, the defense must fail.

Vroom v. *Ditmas*, 4 Paige Ch. 532, citing *Tate* v. *Wellings*, 2 Durn. and East 531.

3. *Intent, an Essential Ingredient.*

If the transaction, says the Court, in *Bank* v. *Owens*, 2 Peters 527, was in violation of the restriction in the bank's charter limiting its power to "take" more more than 6 per cent. interest, "it could only have been upon the ground of an *intention*" to evade the statute.

So also: "In construing the usury laws, the uniform construction in England has been, (and it is equally applicable here), that to constitute usury within the prohibitions of the law, there must be an *intention* knowingly to contract for or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent, *res ipsa loquitur*. But where the contract, on its face, is for legal interest only, there it must be proved that there was some corrupt agreement or device, or shift, to cover usury; and that it was in the full contemplation of the parties." * * * "The *quo animo* is, therefore, an essential indegredient in all cases of this sort."

Bank v. *Waggener*, 9 Peters, 370.

Hotel Co. v. *Wade*, 97 U. S., p. 23.

The requisites of an usurious transaction are three:

1. A loan;

2. A promise to repay the money lent; and

3. The reservation of a greater rate of interest than is allowed by law.

"The intent with which the act is done is an important ingredient to constitute this offense."

Lloyd v. *Scott*, 4 Peters, 205.

The evidence must show a corrupt, guilty *intent* to evade the law.

Acheson v. *Chase*, (Sup. Ct. Minn., 1 Aug. 1881), Alb. Law, Jour., vol. 24, 378.

And, on the part of the lender, to take more than the legal rate of interest.

Palmer v. *Call*, (Cir. Ct. D. of Iowa), 7 Fed. Rep., 737.

"To constitute the offense of usury there must be an agreement that he who has the use of the money *shall pay to the owner* of it more than lawful interest."

3 Parson's Cont. [6th Ed.], 107.

4. *Discount.*

Is defined by Webster as, "to lend money, deducting interest at the time of the loan."

By Bouvier it is said to be "interest reserved from the amount lent at the time of making the loan."

"The holding back of interest in advance is implied in the phrase (discount) itself; it is a part of the definition of the word." Morse on Banking, [2d Ed.] p. 17.

A discount means, *ex vi termini*, a deduction or drawback made upon an advance or loan of money, upon evidences of debt, payable at a future day.

Fleckner v. *Bank*, 8 Wheat., 350.

Authority to "discount, or make discounts," "from the very force of the terms, necessarily include an authority to take the interest in advance." "We do not know in what other sense the word discount is to be interpreted." *Ibid., p. 354.*

And a deduction in advance, from a note discounted, of the legal rate of interest for the full time the note has to run, (1 year, 11 months, and 5 days, at 6 per cent), is not usurious. *Ibid., p. 350.*

The distinction between *loans* and *discounts* is unsubstantial. "The term 'discount,' as a substantive, means the interest reserved from the amount lent at the time of making the loan; as a verb, it is used to denote the act of giving money for a note or bill of exchange, deducting the interest. In a discount, the interest is reserved, or collected in advance; while in ordinary loans the interest is paid, or agreed to be paid, after it is earned. In either case the tranaction constitutes a loan, and a reservation of interest beyond the specified 8 per cent, is usury."

State of Mo. v. *Boatman's Savings Inst'n*, 48 Mo., 189.

Discounting notes, bonds and bills "is only a mode of loaning money."

Talmadge v. *Pell*, 3 Seld. (N. Y.), 328.

Niagara County Bank v. *Baker*, 15 Ohio St., p. 87.

People v. *Utica Ins. Co.*, 15 Johns., 358, 392.

N. Y. Firemen's Ins. Co. v. *Ely*, 2 Cowen, 678, 699.

F. & M. Bank v. *Baldwin*, 23 Minn., 198, 208.

"With the right to take the interest allowed by law in advance."

Niagara County Bank v. *Baker*, 15 Ohio St., 68.

Discounting in advance 8 per cent. for twelve months is not usurious.

Commercial Bank v. *Nolan*, 7 How. (Miss.), 508.

The policy of the United States, as illustrated in the National Bank act: Among the powers granted thereto is that of "discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt."—R. S., § 6136, cl. 7.

They "may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State * * * where the bank is located." And "when no rate is fixed by the laws of the State, * * * the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, and such interest may be taken in advance," for the time the same has to run.—R. S., § 5197.

This is regarded as a declaration or recognition of a general principle that taking lawful interest in advance, for the time the loan may run, is not unlawful.

Deducting interest in advance for the time the loan may run has never been held usurious in Illinois.

McGill v. *Ware*, 4 Scam., 21. (12 per cent. of $2,500 for 1 year).

Goodrich v. *Reynolds*, 31 Ill., 490. (10 per cent. of $500 for 6 months). Citing *Manhattan* v. *Osgood*, 15 Johns., 162, and

N. Y. Fire Ins. Co. v. *Ely*, 2 Cowan, 678.

Mitchell v. *Lyman*, 77 Ill., 525. (10 per cent. of $3,000 for 1 year).

McGovern v. *Insurance Co.*, 109 Ill., 151. (1 per cent. of $43,000 for 3 years).

Hoyt v. *Pawtucket Inst.*, 110 Ill., 390. (10 per cent. of $500 for 6 months).

Brown v. *Mortgage Co.*, 110 Ill., 235. (1 per cent. of $4,500 for 5 years).

So, reserving domestic "exchange" in excess of the legal rate of interest, in note or bill, is not usurious.

Griffin v. *Marine Co.*, 52 Ill. 130.

Commercial Bank v. *Nolan*, 7 How. (Miss.) p. 537.

And a note for $1,000 due 4 years after date with 8 per cent. annual interest* from this date until paid, principal payable 60 days before maturity thereof, does not show usury upon its face; that the annual interest reserved is to be paid 60 days before the lapse of each year, does not render the transaction usurious, as creditors may require payment of interest in advance.

Telford v. *Garrels*, 132 Ill. 550.

The settled doctrine of the Supreme Court of the United States is, that it is not usurious for bankers to deduct the highest legal rate of interest in advance, for the full time the obligation is to run.

Fleckner v. *Bank*, 8 Wheat. 338. (6 per cent of $10,000, for 1 yr., 11 mo. and 5 da.).

Thornton v. *Bank*, 3 Peters 36.

And after a careful review of the leading American cases, Mr. Tyler, in his work on Usury, thus states the general doctrine: "And the State courts have also held that, to take out interest in advance, or discounting a note without regard to the rules of rebate or discount, is not usurious; and, further, in

* Eight per cent being then the highest legal rate.

this respect there is no distinction between bankers and others. That is to say, it is held that discounting a note at the legal rate of interest and taking the interest in advance, is not usury, either in bankers or others; and this is now the well recognized rule."

Tyler on Usury, 156.

5. *Commissions by Agent or Broker.*

An *agent* is defined as one who acts for, or in the place of another, by authority from him; a substitute; a deputy. Webster's Dic.; Bouvier's L. Dic.—*Agent.*

He is bound to execute the orders of his principal, whenever, for a valuable consideration, he has undertaken to perform them. Bouvier—*Duties and Liabilities.* Citing Story's Agency § 189.

An agent is one who acts for and in the stead of another, termed the principal, either generally or in some particular business or thing, and either after his own discreation in full or in part, or under a specific command.

Bishop on Cont., § 1027.

A *broker*, says Webster, is an agent employed to effect bargains and contracts, as a middle man or negotiator, between other persons, for a compensation commonly called brokerage. He takes no possession of the subject matter of the negotiation. See also Rapalje & L. Dic. And a REAL ESTATE BROKER, the same author defines, as one who buys and sells lands, and negotiates loans, etc., upon mortgage. And by Bouvier, as those who negotiate the sale or purchase of real property. In addition to the above duties they procure loans on mortgage security, attend to leasing and collecting rents, etc. Rapalje & L. Dic.—*Real Estate Broker.*

And Bishop on Contracts, § 1,135, defines a broker as "one who as middle man brings persons together to bargain, or bargains for them in the private purchase or sale of property, not ordinarly in his possession; he has no special property in the goods he may sell, nor, on making a sale has he even implied authority to receive payment."

"An authority to loan money at a legal rate of interest does not include, by implication, the authority to loan it at an illegal rate."

Gokey v. *Knapp*, 44 Iowa 32.

Call v. *Palmer*, 116 U. S., p. 101.

"Brokers negotiating loans of other people's money may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious." (Citing Ballinger v. Boulard, 87 Ill., 513; Phillips v. Roberts, 90 Ill., 492; Boylston v. Bain. *Ibid* 283). "Payne v. Newcomb, 100 Ill., 611, was not intended to decide anything to the contrary, as seems to be supposed by counsil for plaintiff in error."

Hoyt v. *Pawtucket Inst. for Savings*, 110 Ill. 394.

When an agent, authorized to loan money at lawful interest, exacts for his own benefit more than the lawful rate, without the knowledge or authority of his principal, the loan is not thereby rendered usurious. The loaner of the money must not only be a party to the usurious contract, but he must take the usury.

Call v. Palmer, 116 U. S., 98.

And when the evidence fails to show that the commission was paid to the loaner, the defense of usury, based thereon, will not be sustained.

Grant v. *Phœnix Life Ins. Co.*, 121 U. S., p. 117.

Agent's commissions, as an element in usury defenses, has often been before the Supreme Court of Illinois:

1. *Ballenger* v. *Bourland*, 87 Ill., 513. There the agent procured a loan and charged a commission and expenses to borrower, but without the lender's knowledge and not for the lender's benefit, and the Court said it was not usury.

2. *Colehour* v. *State Savings*, 90 Ill., 152. There the debtor paid the creditor $1,500, as commission, for procuring another to advance to the debtor the money then due on the creditor's notes, and a year's extension of time. This was held not to constitute usury.

3. *Boylston* v. *Bain*, 90 Ill., 283. There it is *held*, if the principal does not authorize the agent to charge a greater rate of interest than the law allows, and has no knowledge of the agent's doing so, and the principal does not receive the excess above the legal rate, the defense of usury cannot be sustained. And the Court said, in such case, no unlawful and corrupt intent can be imputed the principal. Citing *Condit* v. *Baldwin*, 21 N. Y. 219, where an agent entrusted with money to in-

vest, exacted a bonus for himself as a condition of the loan, without the knowledge of the principal, and it was held no usury.

This case of *Condit* v. *Baldwin*, although by a divided Court and subject to criticism, has been repeatedly sustained and followed and stands unshaken.

Bell v. *Day*, 32 N. Y. 165.

Esteves v. *Purdy*, 66 N. Y. 446.

Guardian Mut. Insurance Co. v. *Kashaw*, 66 N. Y. 544.

Van Wyck v. *Walters*, N. Y. Crt. App. June 8, 1880, Alb. L. Jour. Vol. 22, 175.

Call v. *Palmer*, 116 U. S. p. 101.

4. *Phillips* v. *Roberts*, 90 Ill. 492. There it was held, a broker, loaning other people's money, has a right to charge a commission to the borrower, without rendering the contract usurious. See also, *Jennings* v. *Hunt*, 6 Bradw. 523.

5. *Payne* v. *Newcomb*, 100 Ill., 611. There the loan agent was required to learn the situation of the property offered as security, to examine and ascertain the title, and became personally liable to the lender for any loss sustained through defective title or overvaluation of the security, and the Court found he was the agent of the lender and his taking a commission from the borrower in excess of the legal rate rendered the contract usurious. But in *Hoyt* v. *Pawtucket*, 110 Ill., on p. 394, it is expressly said, that *Payne* v. *Newcomb*, was not intended to decide that a broker loaning the money of others, could not take a commission from the borrower without rendering the loan usurious.

6. *Kihlholz* v. *Wolf*, 103 Ill., 319. The facts in this case as reported in this volume, or in 8 Bradwell, 371, do not clearly appear: but it would appear the lender paid out, at the request of the borrower, some commissions and expenses to persons procuring the loan, and that in that case the contract was not usurious. "That which is paid as commissions and other expenses was paid by decedent (the lender) to other persons at defendant's request. The payments made to third persons to secure the loans were not of the slightest benefit to him." The ruling appears to be based on the fact that the lender only received legal interest, and the case is distinquished from *Payne* v. *Newcomb*.

7. *Meers* v. *Stevens*, 106 Ill., 549. Here the lender loaned his money through his son, who, on a one year loan took 4 per cent commission above legal interest, and at the end of the year, lender referred borrower to another son who extended the loan and took another commission in excess of interest, and the Court found, that the sons were the agents of the father generally, and the contracts usurious, and say, "the circumstances look very much like a family arrangement to charge usury, and cover it up under the claim of commissions."

8. *McGovern* v. *Mutual Union Ins. Co.*, 109 Ill., 151. Boon was the agent of the Insurance company and negotiated a loan for his principal of $43,000 for three years at 9 per cent to McGovern, evidenced by the latter's note. He charged McGovern, and the same was deducted in advance, for negotiating the loan, a commission of 3 per cent, $1,290, and this was relied upon as usury. "When this loan was made the legal rate of interest was ten per cent per annum when the contract provided for this amount. The loan in this case was for three years at 9 per cent interest. Now, the 3 per cent commissions only amounted to 1 per cent per annum, so that if the commissions are regarded as interest, and added to the interest at 9 per cent provided for the note, the rate would still be only 10 per cent and not usurious."

9. *Hoyt* v. *Pawtucket Institution for Savings*, 110, Ill., 390. Taylor was a loan broker in Chicago. Hoyt made application to the Institution for Savings for a loan of $5,000. at 10 per cent, which being forwarded by Taylor to the Institution, at its residence in Rhode Island, was there accepted, and the loan was paid by the Institution (less $250., one half year's interest, deducted in advance), by a draft to the order of Hoyt himself. Taylor charged Hoyt $250. for commissions for securing the loan, which was paid. This commission, and the agreement therefor, was without the knowledge of the lender, and the Institution got no part thereof, and received no more than 10 per cent. on the money loaned, as evidenced by the note given therefor.

The Court held: 1. Taking interest in advance was not usurious; and 2. That the commissions charged by Taylor did not make the transaction usurious, saying: "The Institution for Savings has never received, or agreed to receive, more

than the legal rate of interest upon this loan, and whatever in addition thereto Hoyt has paid Taylor, has been in compensation for services of Taylor in procuring the loan for Hoyt, which was something entirely between themselves, independent of the Institution for Savings, with which the latter had no connection. We fail to discover anything of usury in the transaction."

10. *Brown* v. *Mortgage Co.*, 110 Ill., 235. Hale & Co., of Chicago, procured a loan from capitalists in Scotland, for Brown, of $4,500, for 5 years at 9 per cent. and the latter gave his note therefor. Brown paid Hale & Co., or the latter deducted from the sum loaned, a commission of $225., and which it was charged, rendered the loan usurious. The evidence, the Court said, did not show Hale & Co. to have been the agents of the lender, adding: "If they were not the company's agents, but were the agents of Brown, in that transaction, although he might have paid them an amount which, added to the current interest upon the note, largely exceeded legal interest, it would not prove usury in the loan. It cannot concern the lender what the borrower pays to his own agents. (*Kihlholz* v. *Wolf*, 103 Ill., 362; *Phillips* v. *Roberts*, 90 Ill., 492). The burden of proving a transaction usurious rests upon the party alleging it. (*Boylston* v. *Bain*, 90 Ill., 283; *Kihlholz* v. *Wolf*, *supra*). In the next place, at the time this loan was made (July 15, 1875), it was lawful to exact 10 per cent. per annum interest on money loaned. The note given bears interest only at the rate of 9 per cent. per annum, and runs for 5 years. It has been held, and is the well settled law of this Court that it is not usurious to exact the payment of interest in advance. (*Mitchell* v. *Lyman*, 77 Ill., 525; *Goodrich* v. *Reynolds*, 31 Ill., 490; *McGill* v. *Ware*, 4 Scam. 21). One per cent. on $4,500. (the amount borrowed) for 5 years makes just $225.; and so in any view, interest has not been exacted beyond the rate of ten per cent per annum—the then legal rate. *McGovern* v. *Union Mut. Life Ins. Co.*, 109 Ill., 151."

11. *Ammondson* v. *Ryan*, 111 Ill., 506. Mrs. Ryan having money to loan, advertised for borrowers. She had previously arranged with Snowhook to refer borrowers to him for his approval of the offered securities,—his charge therefor to be 2½ per cent. on the amount of the loan. Ammondson applied

directly, and without the aid of Snowhook, to Mrs. Ryan, and procured a loan of $2,000, (time not known), at 10 per cent interest—the highest legal rate. Of the loan the borrower received $1,900, the other $100 being paid to Snowhook, $50 thereof for passing on the abstract of title and drawing up the papers, and $50 for his 2½ per cent. commission. The deduction of the $100 was charged as usurious.

Snowhook's commission of 2½ per cent., says the court, would seem "to have been the proper debt" of Mrs. Ryan, "previously contracted, and the amount previously stipulated for between herself and Snowhook, and the payment of it by the borrower was equivalent to that increased amount of interest being obtained by the lender in addition to the highest legal rate of interest, and so usurious, under the decision of this court in *Payne* v. *Newcomb*, 100 Ill., 611. This in all the usury we discover in the transaction. The payment by the borrower for the examination of the abstract of title and making out the papers, was proper."

12. *Cox* v. *Massachusetts Mutual Life Insurance Co.*, 113 Ill., 382. Tillotson was engaged in the insurance, loan and real estate business, and was the agent of the insurance company, soliciting life insurance therefor, at Bloomington. Cox came to Tillotson's office and applied for a loan of $3,000, (time to run not shown), at 10 per cent. interest, on real estate security, and Tillotson sent forward the application to the insurance company for its acceptance or rejection. The application was accepted, and loan made, the borrower giving his note for $3,000 at 10 per cent. interest, then the highest legal rate, and secured the same upon real estate. Tillotson charged Cox a commission of 5 per cent., $150, and retained the same out of the amount of the loan. There was no evidence showing that the insurance company knew of the agreement as to commissions between Tillotson and Cox, and no part of such commission was received by the company, though it did appear that Tillotson had made a number of loans for the company, substantially as this one was made.

In respect of the commissions the court says: "They were a matter solely between Cox and Tillotson, paid by the former to the latter for his benefit alone, under Cox's employment of Tillotson to obtain the loan for him. There is nothing of usury

in such a transaction. The fact that an agent, without the authority, consent or knowledge of his principal, upon loaning the money of the latter, exacts from the borrower a sum in excess of lawful interest, does not make the loan usurious. (*Phillips* v. *McKellar*, 92 N. Y., 34; *Palmer* v. *Call*, 7 Fed. Rep., 730; *Ballinger* v. *Bourland*, 87 Ill., 513, and authorities there cited; *Phillips* v. *Roberts*, 90 Ill., 492; *Boylston* v. *Bain*, 90 Ill., 283). *Payne* v. *Newcomb*, 100 Ill., 611, referred to by counsel as favoring a contrary view, is quite another case than the one before us, and does not apply to the facts of the present case."

13. *Haldeman* v. *Massachusetts Mutual Life Insurance Co.*, 120 Ill, 390. "The facts of this case, with the exception of the $100 allowed for attorney's fees, are almost the same as the facts in the case of *Cox* v. *Massachusetts Mut. Life Ins. Co.*, 113 Ill., 382. There a commission of $150 was paid on the original loan, and a commission of $75 for the renewal of the loan, and it was held that there was nothing of usury in the charge and payment of such commissions. The question in this case is whether, under a similar state of facts to that which is stated in the *Cox case*, the payment of the commissions above named of $180 (5 per cent. on a $3,600 loan) and $80 (on renewal) constitutes usury. The opinion in the case referred to is decisive of the present case upon the question of usury."

14. *Massachusetts Mut. Life Ins. Co.* v. *Boggs*, 121 Ill., 119. Frisby & Rappleye, of Chicago, were the agents of the insurance company for soliciting insurance, but they also did business as loan agents. Through them Boggs procured two loans from the company, at 10 per cent., the highest legal rate of interest, and paid the agents a commission of 2½ per cent. thereon.

"The facts here," says the Court, "are substantially the same as in *Cox* v. *Massachusetts Mut. Life Ins. Co.*, 113 Ill., 382, where we held that the loan was not usurious, and the ruling there must govern here. * * The insurance company made the loans at 10 per cent. interest, which it had a right to do under the law, and if the borrower saw proper to pay a bonus to some outside party to aid in procuring the money, that is a

transaction which does not, in any manner, have any bearing on the contract under which the insurance company loaned the money."

15. *Telford* v. *Garrels*, 132 Ill., 550. Telford borrowed of Ryhener & Co. $12,000, giving therefor 12 $1,000 notes, drawing 8 per cent. interest, the then highest legal rate, secured on real estate, and paid one Cone a commission of 2 per cent. ($240) for getting the money, and this is charged as usury.

"This depends," says the Court, "upon the question whether or not Cone was the agent of Telford in procuring the loan from Ryhener & Co. If appellant employed Cone to get the money, and paid him a commission for so doing, the lenders cannot, for that reason, be charged with usury. The trial court found that Cone was appellant's agent in the premises and we think that such finding is supported by the evidence. As the appellant alleges usury, the burden was on him to prove it, and it was his duty to establish it by a preponderance of the evidence. He has failed to do so."

16. *Sanford* v. *Kane*, 133 Ill. 199. Kane borrowed of Sanford $500 and gave his note therefor, payable to Sanford in 3 years with 10 per cent. interest, that being the highest legal rate, and secured the same on real estate. Eleven months thereafter Sanford assigned the note to Whittlesey, who, as assignee of the mortgage—not the note, sold under a power and Sanford became the purchaser. On bill to redeem it appeared that Sanford only paid Kane, at the time the loan was effected, $475, retaining the $25 as commission for procuring the loan from Whittlesey. The Court found the money loaned belonged to Sanford, that he took the note and mortgage to himself long before the assignment to Whittlesey, controlling the securities and finally becoming the purchaser, and that the transaction was evidently one "not infrequent where a loan is taken at a high rate of interest and subsequently sold to investors of money," and was usurious.

But, says the Court, "undoubtedly a broker, negotiating loans in good faith from others, may charge the borrower commission without rendering the loan, at full rate of legal interest, usurious. *Hoyt* v. *Pawtucket Inst. for Savings*, 110 Ill., 392; *Phillips* v. *Roberts*, 90 *id.*, 492; *Boylston* v. *Bain*, *Ibid*, 283; *Ballinger* v. *Bourland*, 87 *id.*, 513."

17. *Ryan* v. *Sanford*, 133 Ill, 291. Sanford was a loan broker at Morris, Illinois, and received an application for a loan, $650 at 10 per cent., from Ryan, and the latter agreed to pay Sanford 4 per cent. commission for his services in getting the money. Sanford sent the application to Trowbridge, at Poughkeepsie, N. Y., who accepted it and sent the $650 to Sanford. The loan was evidenced by the note of Ryan, at 10 per cent., secured on real estate, payable to Trowbridge. Sanford deducted his agreed commission, $26, of which Trowbridge had no knowledge, and paid the balance to Ryan, and sent to Trowbridge the note, mortgage (duly recorded) and abstract of title. The taking of the commission was charged to be usury, and in respect thereto the Court says: "The allegation that the transaction out of which the mortgage grew was usurious not only fails of being sustained but is clearly disproved. Trowbridge, the mortgagee, is shown to have advanced out of his own money the entire sum mentioned in the note and mortgage, and the rate of interest agreed to be paid did not exceed the rate at that time allowed by law. If the complainant (Ryan) paid commissions such payments were made to his own agent and are matters of which Trowbridge had no knowledge, and with which he had no concern."

V.

REHEARING.

Entering Orders, etc., Nunc Pro Tunc.

This term, *nunc pro tunc*, is used to denote the doing of a thing at one time which ought to have been performed at another.

The power of the Court over its own records is fully established, and rests upon the soundest principles of justice and equity.

In England, judgments pronounced but not enrolled, were permitted to be enrolled years afterwards, though ordinarily the time was limited to one year.

Lord Mohan's Case, 6 Mod. Rep., p. 59.
Hodges v. *Templer*. Ibid. p. 191.
Blewett v. *Fregonning*, 4 Adolph. & Ellis 1002.

Such action was not indulged where the delay was caused by act of the parties, but only when occasioned by the Court.

Fowler v. *Whadcock*, Barnes' Notes 262.

Chitty's Archibald's Prac. [10th Ed.] p. 1502, [12th Ed.] p. 1572.

Turner v. *London & S. W. Ry. Co.*, 17 L. R. Eq. Cases, p. 566.

As, "where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case."

Lawrence v. *Hodgson*, 1 Younge & Jervis, p. 372, 3.

So, an answer exhibited but not filed, was allowed to be filed *nunc pro tunc*.

Anonymous. 1 Molloy's Repts. (Irish) 462.

And an answer unsworn to be withdrawn, verified and refiled *nunc pro tunc*.

Carter v. *Bosanquet*, 13 Price's Repts., Exchr. 604.

The rule in this country seems to be that the entry of orders, decrees and judgments *nunc pro tunc* do not rest in right, but of favor. Adopting the language of decision:

"It rests in discretion, influenced, in its exercise, by peculiarity of circumstances; and its propriety is not, therefore, to be inquired into by writ of error."

Ley v. *Union Canal*, 5 Watts (Pa.) 104.

In *Insurance Co.* v. *Boon*, 95 U. S., p. 125, the question was, as stated by the Court, "whether the Court could, at the September term, [judgment having been entered at the preceding April term], by an order, correct the record by incorporating into it, *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered." And it was said:

"It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, or directed to be entered and become of record as of a former term. In *Rhoads* v. *Commonwealth*, 35 Penn. St., 276,

Gibson, C. J., said: 'The old notion that the record remains in the breast of the Court only till the end of the term has yielded to necessity, convenience and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors'. Even judgments may be corrected in accordance with the truth. It has been held by this Court that, at a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one. *Matheson's Adm'r.* v. *Grant's Adm'r.*, 2 How., 282. And this has repeatedly been held elsewhere. Generally, it may be admitted, that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; *but every court of record has power to amend its records so as to make them conform to and exhibit the truth.*"

So, in case of bills of exceptions, it has, it seems, always been the practice to allow them to be signed *nunc pro tunc.*

Walton v. *United States*, 9 Wheat., 657.

Turner v. *Yates*, 16 How., p. 29.

If the exception is taken upon the trial, the bill may be signed *nunc pro tunc;* and this is in accordance with the practice of courts of error.

Stanton v. *Embrey*, 93 U. S., p. 556.

Hunnecutt v. *Payton*, 102 U. S., p. 353.

Was the action of the court in directing the order allowing the rehearing before a full bench to be entered as of the time when made, justified?

Upon what state of facts the court based its action of a filing *nunc pro tunc*, is not shown by the record.

In such case the rule is that a court of review will presume, in favor of proceedings in a court having jurisdiction of the parties and subject matter, that justice was administered in the ordinary form.

Stockton v. *Bishop*, 4 How. 167.

Townsend v. *Jimison*, 7 How., p. 719.

And its judgment proper.

Bognell v. *Broderick*, 13 Peters, p. 446.

If the proceeding was not in the ordinary form—if the action of the court in delaying the entry of the formal order was caused by the neglect of the parties, and not occasioned by the court's own act, the party complaining of the court's act should have incorporated the facts in the record, that the reviewing court might see that the course adopted by the court was irregular. In the absence of all showing, the presumption of regularity must prevail. Error will not be presumed, it must be shown.

Kearney v. *Denn*, 15 Wall., p. 56.

If the facts were such as to call into exercise the discretion of the court—and in the absence of a contrary showing, such is the legal presumption, the exercise of such discretion is not subject to review.

Terry v. *Commercial Bank*, 92 U. S., 454.

The action of the court in respect of directing the order allowing rehearing to be filed *nunc pro tunc*, not having been challenged in the trial court by objection, exception, or otherwise, no question is presented for review.

Hamilton County v. *Massachusetts*, 6 Wall., p. 636.

SUMMARY.

The legal principles deducible from the authorities are:

1. Under the general comity among States, a private corporation of one State may exercise corporate powers in the several States, unles (*a*) forbidden so to do by its charter, or (*b*) inhibited by the policy of such other State.

2. Where a corporation has entered into a contract unauthorized by its charter, and the same has been performed, that party receiving the benefit of the contract, will not be permitted to rely upon the want of corporate power to defeat an action brought to enforce the contract, by the party having performed it.

3. The remedy, as against a corporation for violations of its charter, rests with and can be invoked by the State alone.

4. The execution of a mortgage to a corporation as security for an indebtedness thereto, is an admission of the legal capacity of the corporation to enforce its rights thereunder, and operates as an estappel to the denial of such power and right.

5. An express grant to a corporation of power to loan money at any rate of interest allowed by law, and to establish agencies in other States for the transaction of its legitimate business, are corporate powers which it may exercise in other States, according to the laws and policy of such other States.

6. The rate of interest or discount which such corporation may legally recover or take, is the rate prescribed by the laws of the State where the contract is made.

7. The *lex loci contractus* controls in determining the validity, construction and interpretation of contracts.

8. Ordinarily, a contract made in one State, to be performed in another, is presumed to have been made in contemplation of the law of the place of performance; but, in a contract for the payment of money, if valid where made, though invalid at the place of payment, the contract will be referred to that law which will sustain it, as an intention to violate the law will never be presumed.

9. So, a contract in good faith for the loaning of money, wherein or whereon no more legal interest is reserved or taken by the law of the place of the contract, will be sustained and enforced, though the rate of interest or discount reserved or taken exceed that allowed by the law of the place of payment.

10. And, if such loan be secured by mortgage upon lands situate at the place of the contract, the parties will be presumed to have contracted in respect of such law, although by the law of the place of payment the rate of interest reserved or taken exceeded the legal rate—the fact that the mortgage could be foreclosed, and the fruits of the security realized, alone within the jurisdiction of the *lex loci contractus*, would, in the absence of a clear showing to the contrary, be conclusive of an intention by the parties that the contract was to be referred to the law of the place where made.

11. Whether or not a contract is usurious, is to be determined by the law of the contract in force at the time of its execution.

12. Usury laws are penal in character and do not operate extra territorally.

13. If the contract is free from usury, according to the law of the contract, this court will adopt the construction and interpretation of the local statutes given by the local tribunals.

This being an Illinois contract, its validity is to be tested by Illinois law, and the construction given that law by the courts of Illinois, will here control.

14. The requisites of an usurious transaction are: 1. A loan. 2. A promise to repay the money borrowed. 3. The reservation or taking of a greater rate of interest or discount than is allowed by law, with intent to evade the statute. In other words, there must be an agreement between the lender and the borrower, that the borrower shall pay to the lender more than lawful interest.

15. If the rate of interest reserved in the contract exceeds the legal rate, the intention to evade the statute will thereby sufficiently appear; but if, upon its face, the contract is free from usury, and facts outside the contract are to be resorted to as showing usury, such facts must be pleaded, and proven as pleaded—to succeed, the defendant must establish, by preponderating evidence, the defense set up and relied upon in his plea or answer.

16. To discount a loan is to withold from the sum of the loan; interest for a given time at a given rate per cent.

17. The discounting of a loan at a rate per cent. per annum not forbidden by the law, for the time the loan is to run, is not, by the law of Illinois, nor is it generally, usurious. And in respect of discounting loans, the right is not confined to bankers.

18. A contract, therefore, by which it is agreed that the sum of the loan shall be discounted at a rate per cent per annum, and for a time named, means, in legal contemplation, that the lender may withhold from the sum of the loan the sum of the discount so produced.

19. The interest and usury laws of Illinois deal alone with the *rate per cent. per annum*, and do not deal with the time nor amounts of loans. What the law forbids, and all it forbids, is "to take, reserve or discount interest," at a rate exceeding 10 per cent. per annum.

20. The withholding from the sum contracted to be loaned, of interest, at a rate per cent per annum not exceeding that fixed by the law, for the time the loan is to run, is, by the law of Illinois, not illegal, and in no way affects the validity of the contract.

21. An agent is one who, being thereto authorized, acts in place of, and as a substitute for, his principal, and, within the limit of his authority, binds his principal.

22. A valid contract of agency must be supported by a good or valuable consideration.

23. It is a legal solecism to assume that an agency can exist, where the alleged agent, is charged with no duty and incurs no obligation to the supposed principal, and there is no consideration moving between the parties, and where no act is performed by the alleged agent whereby he assumes to bind the supposed principal.

24. A broker is one, who, as middleman, for a consideration paid or agreed to be paid, brings persons together to bargain, or bargains for them, in private property transactions. He does not have possession of the property the subject of bargain, has no right of property therein, nor, in case of sale, has he even implied authority to make or receive payment.

25. By the law of Illinois, the agent of the borrower may contract with and receive from the borrower, a commission, to be reserved out of the sum of the loan, for his services, and the contract of loan is not affected thereby. What the borrower pays his agent, is no concern of the lender.

26. By the same law, the agent of the lender may contract with the borrower and receive from him a commission for services rendered the borrower in procuring the loan, reserving such commission from the sum of the loan, without rendering the contract of loans usurious; provided, (*a*) the lender is without knowledge of the agreement respecting commission, and (*b*) that he neither contracts for nor receives more than the legal interest. In such case, the corrupt intent to evade the statute, or the corrupt act of receiving illegal interest, both essential, concerning ingredients to constitute usury, are wanting.

27. And by the same law, a real estate broker, with or without the knowledge of the lender, may contract with and receive from the borrower, a commission or brokerage for his services in procuring the loan, without thereby rendering the contract of loan usurious.

28. The power of a court of record over its own records, to make them speak the truth, by the entry of orders, judgments, etc., *nunc pro tunc*, inheres in the court, and is an exercise, not of a right demandable by parties, but of a sound, legal discretion, which, in the absence of recitals in the record showing an abuse of discretion, is not the subject of review.

ARGUMENT.

May it please the Court:

The principal question presented by this record is, was the contract of loaning usurious? In the view taken by counsel and under the authorities, that question is to be determined by a consideration of the interest and usury laws of Illinois, in force at the time the contract was entered into. And in reaching such determination this court will feel bound to accept the construction placed upon the statute of Illinois by the Supreme Court of that State; and this court will the more readily adopt such construction because such construction is in harmony with the general current of American decision.

The Court's attention is first called, however, to the fatal variance between the defense set up in the answer, and the indubitable facts established by the evidence.

The first material fact alleged and relied upon is the agency of Johnston. Unless the evidence shows him to have been the agent of the Trust Company, and as such was a party to the contract of loaning—an active participant in the treaty, and in setting the terms of the negotiation which resulted in the contract, it is evident that such was not the relation he sustained to the Trust Company.

The evidence does not show that Johnston had a dollar of the Company's money in his hands for the purpose of loaning it for the Company or for any purpose whatever. Nor is there a word of testimony tending to show that he was ever instructed, directed or requested, to loan a dollar of the Company's money, nor did he assume to loan the money of the Company, or to do any act whatever—the simplest and most irrelevant, by which to bind the Company. Nor did the defendant understand that Johnston either had the money of the Company for the purpose of loaning it, or was authorized to enter into a contract of loaning for and on behalf of the Company. The formal written

application of the defendant was addressed to the Company at New York, and this application with its accompanying evidence of title, was, as he well knew before the contract was consummated, sent forward to the Company itself for its corporate action thereon. Had Johnston been the agent of the Company in entering into the contract of loaning, he would, himself, under his authority as agent, have determined and informed him that the principal would not loan him $10,000 for *five* years, but would require him to keep the money for *five* years, just as the Company itself, through its corporate agents in New York, did determine and require. So, too, had Johnston been the agent of the Company to settle the terms of the contract of loaning, he and not the Company itself after the application had been sent to it at New York, would have determined that 7 per cent interest should be reserved in the bonds, and that the sum of $1,042.20 should be discounted for the five years, and deducted in advance from the sum of the loan. The terms of the contract just referred to are of the essence of it, for the defendant claims that therein lies the vice that annuls it. If Johnston was not authorized as the agent of the Company to incorporate into the contract these substantial conditions, and did not in fact prescribe them, it is idle to say that in respect thereof he was the agent of the Company.

Again, as we have shown, a contract of agency, in principle, in no way differs from other contracts. Unless the character of Johnston's agency was such, that upon the discharge by him of the duty imposed by his employment, he could recover for his services, it is manifest, that there existed no contract between him and the Company. The agreement to pay for services to be rendered by an agent, would be a sufficient consideration, no doubt; but when, as here, the alleged principal gives timely notice that he will pay nothing—that he will not and does not demand a service, that he will not and does not direct a service, that he will not and does not pay for a service, the idea, that out of such a condition of affairs an agency can spring, so potent as to vitiate a contract not in fact entered into by the person as agent, is abhorent to law and reason.

The real relation that Johnston sustained to the parties, in the light of the authorities cited, manifestly was that of real estate broker. Every act of his, as also every act of the defendant

and the Company, is consistent with this relation. He was the middle man—the medium of communication, by whom the defendant and the Company were brought together, and through whom all negotiations were carried on. He did not have possession of the property, the subject of negotiation, nor *assume to* bind either party; but, by his mutual aid to both parties, enabled them to agree upon the terms of their contract, and to consummate it. It was the defendant who sought him out, solicited his assistance, and employed him, for an express consideration to be paid, to procure for him the loan of $10,000, upon such terms and security as he could accept and offer. And this is what he did, and all he did.

No significance whatever can be attached to the fact that Johnston drew the draft representing the present value of the securities, upon the basis of the contract of loan—Dr. Fowler might, with perfect propriety, have drawn it himself; and in selecting this mode of procuring the money to be paid to him in Springfield, Johnston was but performing the usual act of a loan broker, after the parties had concluded their bargaining; and in the performance thereof he must be considered as the agent of and representing the person under whose employment he was acting.

If Johnson was either the agent of the defendant, or was a loan broker, then his contract with the defendant for commissions for procuring the loan in no way affected the contract of loan. This is, as has been shown, the uniform holding of the Supreme Court of Illinois, and such is, also, the whole current of decision.

And it may well be doubted whether a loan broker, employed by the owner to procure a loan of money upon real estate, by any agreement with either of the parties to the loan, could taint a contract of loan with usury that, upon its face, was legal and fair. It is the agreement of loan—the agreement entered into by the borrower and the lender, which must be corrupt, and being corrupt and in evasion of the statute, is inhibited. The usury law takes no cognizance of the contract between the borrower and his agent respecting the services of the latter, and the compensation paid therefor, any more than it does of agreements between the lender and any agent in its employ. So long as the lender neither contracts for nor takes interest

upon his loan in excess of the legal rate, all the parties—lender, borrower, broker—are free to contract as they please, and whatever their contract may be, the contract of loan will be unaffected thereby.

Nor is it at all material that in respect of the account of the present value of the securities, which Johnston made up and mailed to the Trust Company, he attached to his signature the word "Agent." He was under employment by the defendant to procure him a loan on his real estate—for that purpose he was his agent; but this fact, on the hearing in the court below, was relied on as showing that he was the agent of the Trust Company. Had this been a communication from him to the *defendant* upon which he acted, relying upon his agency under authority of the Trust Company, and the latter had accepted the fruits of his acts as such agent, undoubtedly the Company would have been bound by his act, but such is not the case. He is writing to the Company. There was between him and the Company no contract of agency, as the Company well knew, and the Company—the only one who could have been misled by a false representation of agency—is not complaining of any such misrepresentation on the part of Johnston. The Company knew he was a loan broker, and might, perhaps, have inferred that he was acting under employment as agent of the defendant. That he was employed by the defendant is now shown; but at that time the Company had no knowledge of such employment, nor was it under any legal or moral obligation to inquire and ascertain the real fact. It had a right to contract, upon the loan of its money, for the highest legal rate, regardless of any agreement the defendant might have made to pay the intermediary—the loan broker—a commission for procuring the loan.

In every instance where the Supreme Court of Illinois has held the middleman the agent of the lender, such middleman has acted as the substitute for the lender, or was charged with an important duty and obligation to the lender, or the loan was in fact made for his individual benefit.

Having regard, therefore, to the substance and not the shadow, to acts and facts, and not words, it is, as counsel contends, manifest, that the averment in the answer that Johnston was the agent of the Trust Company, and as such was a party

to the contract of loaning, is not sustained. In this respect the variance between the fact pleaded by way of defense, and the proof, is fatal.

But this is not all: It is averred in the original answer, that there was deducted from the sum of the loan, at the time it was made, as agent's commission, the sum of $1,027.26; and in the amended answer, that at the time the loan was consummated, there was deducted the sum of $1,350, as interest at 3% for five years, and $128.15 agent's commission; while the fact was, as shown by the evidence, that no deduction whatever was made for account of agent's commissions, and that the actual deduction of $1,042.20 was the sum of the discount withheld for the five years the loan was to run. Here again, the variance between the averments of the answer and the proof, is fatal.

But again: In the original answer the averment is, that the defendant received, as the consideration of the securities executed by him, only the sum of $7,972.74, and in the amended answer, only the sum of $7,521.85; while the proof shows that the defendant received for such securities, $7,809.69. And this variance, counsel insists, is fatal to defendant's contention.

But, aside from the failure of the defendant to establish by a preponderance of the evidence the fact relied upon, that Johnston was the agent of the company in making the contract of loan, and which failure, from its very nature, counsel contends, takes from this case all question of agent's commissions; and the failure of the defendant to establish his averments respect the character and amount of deductions made, and the sum actually received by him from the Company, the material averment, found in the amended answer, that at the time the contract of loan was made, the Company deducted from the sum of the loan and retained, 3% of $9,000., for five years, can, in no sense, be regarded as established by the evidence. Three per cent per annum for 5 years, of $9,000., equals $1,350. The averment, then, is, that the company deducted from the sum of the loan, the full sum of $1,350., where as the sum actually deducted as and for discount for 5 years, was $1,042.20, and the variance, in this regard, between the fact averred and the

proof, is the substantial sum of $307.80. And the same fatality of variance attends the averment when applied to the rate of discount. The rate per cent per annum averred is, 3% for 5 years, whereas the rate per cent per annum employed to produce the sum discounted, $1,042.20, is not 3%, but $2\,^{316}/_{1000}$ per cent per annum. Two and $^{316}/_{1000}$ per cent of $9.000. for 5 years exactly produces $1.042.20, the sum discounted. By which it is made to appear with mathematical certainty, that the difference between the rate per cent per annum averred and proved, for the time stated, is the fraction $^{684}/_{10000}$, reduced to its simplest form, $^{171}/_{250}$ of 1%, and which difference in rate, for the five years, produces the substantial sum of $307.80, as before shown.

The specific charge brought by the defendant against the company, is that it withheld—deducted in advance, interest at the rate 3% for 5 years, under a contract of loan at the rate of 10% for 5 years, 7% of which was reserved in the bonds; and the legal deduction to be drawn from the fact of such discount, it is said, is, that the contract of loan is thereby rendered usurious. If the defendant has failed to prove the fact as averred, whatever else the evidence may show, he has, under the authorities and by the commonest rules of pleading and evidence, failed in his defense, and can take nothing thereby.

Still, directing attention to the matter of variance, counsel observes, that the averment of a corrupt agreement with Johnston, by which a deduction for agent's commissions was effected, necessarily envolves a knowledge of such agreement by the Company. Ordinarily, notice to an agent is notice to his principal; but, under the interest and usury laws of Illinois, as construed by the Supreme Court of that State, and as shown by the cases cited, (and every case decided by the court upon the question is herein cited), if the agent of the lender, *without the knowledge of the lender*, takes for himself commission from the borrower, a contract of loan at the highest legal rate, is not thereby rendered usurious. This being the law of Illinois, in order to maintain the averment of a corrupt agreement in respect of agent's commissions, it was necessary for the defendant, by proof, to establish a knowledge by the company of the agree-

ment of the defendant with Johnston, for the payment of commissions in excess of the highest legal rate of interest reserved or taken. This the defendant wholly failed to do.

Furthermore, the defendant, by his answer sought to challenge the power of the company to loan money in Illinois, at a higher rate of interest than was allowed by the law of Connecticut,—the law of the creation and residence of the company; but defendant wholly failed to prove what the laws of Connecticut were on the subject of interest and usury; and because foreign statutes relied upon and pleaded must be proved, the variance between the averment and proof, in this respect, is fatal to that branch of the defense. And for the same reason the defendant must be held to have abandoned his defense of usury under the New York law, since no proof was offered by him respecting the facts in connection with the Life Assurance Company of New York, or of the statutes of New York respecting interest, usury or security for loans made by a corporation of that State. A reference to the authority cited in the Brief upon the questions above referred to, is all that seems to counsel to be necessary or desirable.

The question of the power of the Trust Company, under its charter, to exercise corporate powers and to loan its money at all in the State of Illinois, if it can be said to arise upon this record, (which counsel does not concede,) would seem of easy solution. By its charter the company is authorized to loan its money "at any rate of interest allowed by law," to secure the same upon real estate, and to transact its legitimate business in other States. In effecting loans in the State of Connecticut, the Company is unquestionably limited, as individuals are there limited, to the rate of interest or discount fixed by the laws of that State; but the moment it passes beyond the boundary of that State, by virtue of the comity among States, being authorized in the State of its creation to loan money and secure the same upon real estate, it may exercise the same power in any other State, loaning money at such rate as may be there lawful, and securing the same upon real estate, as by law is there provided, so long as by so doing it does no violence to the policy of such other State. If, before, the question were at all a

doubtful one, it would seem that the recent decision and opinion of this Court, by Mr. Justice Harlan, and cited in the Brief, has removed all question.

That the action of the Trust Company in going into Illinois, to find profitable and safe investment for its funds, was not violative of any public policy of that State, is, as counsel think, shown by the legislation of that State, copied in the Statement and refered to in the Brief. Indeed, the books of reports of the Supreme Court of Illinois overflow with cases where the rights of foreign corporations, similar to this Trust Company, have been adjudicated and maintained. And if this were not so, it is within the personal knowledge of the court and of counsel, that one of the direst calamities in the world's history was rendered retrievable, by the influx and investment of the capital of foreign corporations, not unlike this Company, upon the faith of the people and laws of Illinois, and that with the knowledge and tacit consent of the State itself; and experience has shown that that confidence was not misplaced.

But if the Company, by loaning its money upon mortgage in Illinois, exercised a power not given it by its charter, still, the law is, as we have seen, that the defendant, having enjoyed the benefits of such contract, cannot be heard in denial of the Company's right to enforce its security. And the law is, also, that by executing the mortgage the defendant admitted the legal capacity of the Company to enforce its provisions, and is estopped from asserting the contrary.

And as respects that branch of the defense founded upon the supposed violation of the usury laws of New York, it need only be said: The fact that the bonds were by their terms payable in New York in no way affected their validity, or the validity of the mortgaged security, since the validity of the contract of loaning, and of the security pledged for the payment of the bonds, depended, not upon the law of New York, but upon the law of Illinois. The contract was made in Illinois, the indebtedness created was secured upon Illinois real estate; and whether or not the contract was valid, and the lien given by the mortgage enforcible, is to be determined by a consideration of the

laws of Illinois. But if this were not so, this feature of the defense must fail, since no evidence was offered in support of the averments underlying it.

The substantive ground of defense in this case, and the only one counsel submits worthy of more than the passing attention of the Court, is that in respect of discount.

The Company was, by law, authorized to contract for interest at the rate of 10 per cent per annum upon its loans.

It reserved 7 per cent in the bonds. The legality of this reservation is not questioned. In addition to the 7 per cent reserved in the bonds, it discounted the loan, for the term of 5 years, at the rate of $2^{316}/_{1000}$ per cent per annum. Did this render the *whole* contract of loan usurious?

To effect such result the Company, by adopting the method it did, must: 1. Have resorted to the *reserving* a part; and *taking* a part of its interest, *with intent* to evade the statute; and, 2. Have reserved and taken more than *at the rate* of 10 per cent per annum; and both these elements must be present. As we have shown, the contract must be a corrupt one—an evasion of the statute, intended to and in fact violating it. Nothing less than this will suffice.

There is call for a refinement of discernment beyond the capacity of counsel, if it can be said that either proposition is fairly maintainable under the established facts of this case, in connection with the law of Illinois as expounded by its highest tribunal.

The same section of the statute which gave this Company the right to *reserve* interest, also gave it the right to *discount* interest. The word "discount" had, at the time it was employed by the legislature of Illinois, a well known legal meaning, and it has the same meaning to-day.

It meant then, and it means now, the withholding of interest from the sum agreed to be loaned at the time of making the loan,—taking interest in advance. The limitation upon the creditor was that the rate per cent. per annum of discount should not exceed the maximum rate fixed by the law. And in every case where this statute has been before the Court, from Scammon's reports to the last unpublished volume of decisions,

the Supreme Court of Illinois has not hesitated or wavered, but has steadily and uniformly said and decided, that for the creditor to take interest in advance was NOT usurious.

If the taking of $2\ ^{316}/_{1000}$ per cent. per annum discount in this case is usurious, it must be because of some distinction in principle between this case and the many cases that have been before that Court. The cases referred to are grouped in the Brief, *ante*, p. 26, and it is there shown that the Supreme Court of Illinois has sustained as legal and not usurious the taking of 12 per cent of $2,500 for 1 year, of 10 per cent of $500 for 6 months, of 10 per cent of $3,000 for 1 year, of 1 per cent of $43,000 for 3 years, of 10 per cent of $500 for 6 months, and of 1 per cent of $4,500 for 5 years; and in no case and under no circumstances known to counsel has that tribunal held the taking of interest, whether taken and withheld as interest in advance, as discount, or as agent's commissions where the interest and such commissions for the time the loan run together did not exceed the legal rate, was usurious, but on the contrary has sustained the taking.

The final decree in this case was predicated, as counsel understand the letter of the Circuit Judge, *ante*, page 10, upon the fact, that the Company had discounted this loan *for 5 years*. It was conceded by the distinguished judge referred to, in that letter of direction, that short time loans might be discounted without violating the Statute; and yet no attempt was there made, as, indeed, none can be, to draw the line of demarkation between a legal and an illegal *time* of discount. What is that short time which is legal? As long ago as the *Fleckner case*, in 8 Wheaton, cited in the Brief p. 26, this Court held that the Bank of the United States might discount an obligation, to the full extent of its charter power respecting interest, 6 per cent for 1 year, 11 months and 5 days; and Illinois, whose law is under consideration, neither in the letter of her Statute nor by construction of her courts, has not drawn or indicated in any way, a time limit upon the right of the loaner or creditor to take interest or discount in advance. And it would seem that the courts of the United States might well say, to a resident and citizen of Illinois, it is impertinent in you

to ask us to place a construction upon the laws of your own State, at variance with the settled holdings of her courts, in a case where no Federal question is involved.

As has been shown, in order that the contract by which this loan was discounted at the rate of $2\,^{316}/_{1000}$ per cent per annum for five years, should be in violation of the statute, it must have been entered into *with intent* to evade the statute. The fact that the discount was taken, is the only fact shown or that can be relied upon. In the light of the language of the Illinois statute, and the repeated declarations of her highest judicial tribunal, is it not an unreasonable and an unwarranted presumption to impute to the parties to this contract an *intention* to evade the statute. It is for the legislature to declare the law, using apt words to that end, and for the courts to construe the words employed. And it would seem, that when the courts had, by a long line of decisions, placed a uniform construction upon the words of the law, the citizen, resident or non-resident, might act upon such construction without having imputed to him an *intention* at variance with such construction. This would be, as counsel think, carrying the doctrine of presumptions to a dangerous extent. Usury laws are, in character, penal; and while every one is presumed to know the law, and to be amenable to its pains when it is violated, the general rule is, that if the offense created by the statute is of that character requiring a union of act and intent, and the character of the act be not such as to raise a legal presumption of intent, the intent must be proved as a substantive fact. So, in cases under the usury laws, if more than the legal *rate* be contracted for or taken, the intent to evade the statute will be presumed, but when the *rate* is legal, no such presumption arises. Here, the legal *rate* was not exceeded. The 7% reserved, and the $2\,^{316}/_{1000}$ per cent taken, were less than the rate which the parties were authorized to contract for; and counsel contends, that in such case the presumption of corrupt intent cannot arise, and proof of such corrupt intent was necessary to invalidate the contract. No such proof is found in this record.

It is also insisted that the decree should have provided and made allowance to the complainant, as for solicitor's fees, such sum as it was provided in the trust deed the trustee might take upon sale under the power.

The trustee died; the successor trustees refused to act; and the legal title of the mortgagor could be divested, and the equitable right of the *cestui que trust* be enforced, only in a court of equity, and the sale contemplated in the trust deed only be made under judicial decree. Under such a state of case, the equitable character of this claim seems undoubted. Counsel is unable to cite any case in precedent, and reliance is placed alone upon the equitable nature of the claim.

It only remains for counsel to speak of the power of courts of record over their own records.

While counsel, at this writing, have had no opportunity of examining the briefs or arguments of counsel for the defendant, it is understood that reliance is placed upon Rule 88 of this Court. For, if that rule can be invoked, and thereby the decree of October 20, 1884, become the final decree in this case, from which no appeal or writ of error will lie, these appeals must be dismissed, to the defendant's great advantage.

Of Rule 88 it is unnecessary to speak, further than to say, that the action of the lower court in restoring to its files a presumably lost order, is not the case provided for in the Rule.

Of the fact, as known to counsel, respecting the action of the Court in directing the order allowing the petition for a rehearing to be filed *nunc pro tunc*, he is not permitted to speak; but as lawyer he may say, that as no facts are disclosed in the record showing under what circumstances that order was made, and that the circumstances were not sufficient to justify the act of the Court, the legal presumption will prevail that the action and proceeding of the Court was regular. For the rule is, that only those errors appearing in the record will be considered by a court of review. Had it been the purpose of the defendant to rely upon a supposed error in the action of the court in this regard, he should have objected thereto at the time, and have preserved his objections and the Court's rulings thereon, in the record. If parties see fit to lie by while adverse or erroneous action is being taken, without invoking the power of the Court then and there to correct the error, the rule is, that all objection is waived, and that the party has elected to abide the action of the Court. And this rule, of universal application counsel

believes, is founded upon obvious principles of justice and common sense. Courts are not thus to be trifled with, nor do the rights of persons, parties litigant, depend upon future caprice.

That the decree in this case, by denying to the Trust Company its right to a recovery for the full amount of the principal expressed in the bonds, and the unpaid interest thereon after maturity according to the contract rate, and by denying relief as to solicitor's fees, is erroneous, counsel insists, has been abundantly shown, and its reversal is demanded by every consideration of justice and equity.

Respectfully submitted,

WILLIAM L. GROSS,
Solicitor for Equitable Trust Company.